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Trade and Development Board
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Intergovernmental Group of Experts on Competition Law and Policy
Seventeenth session
Geneva, 11–13 July 2018
Item 2 of the provisional agenda
Adoption of the agenda and organization of work

Provisional agenda and annotations

I. Provisional agenda

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2. Adoption of the agenda and organization of work
3. Work programme, including capacity-building in and technical assistance on competition law and policy:
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     - (i) Challenges faced by developing countries in competition and regulation in the maritime transport sector
     - (ii) Competition issues in the sale of audiovisual rights for major sporting events.
   - (b) Voluntary peer review of competition law and policy of Botswana
   - (c) Report of work on capacity-building in and technical assistance on competition law and policy
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II. Annotations

Item 1
Election of officers

1. The Intergovernmental Group of Experts on Competition Law and Policy will elect a Chair and a Vice-Chair-Cum-Rapporteur.

Item 2
Adoption of the agenda and organization of work

2. The Intergovernmental Group of Experts may wish to adopt the provisional agenda contained in chapter I above.

3. It is proposed that the first plenary meeting, which will start at 3 p.m. on Wednesday, 11 July 2018, be devoted to procedural matters (items 1 and 2 of the provisional agenda) and introductory statements. The closing plenary meeting, on Friday, 13 July 2018, will be devoted to the adoption of the report and the provisional agenda of the eighteenth session of the Intergovernmental Group of Experts to be held in July 2019 (item 4 of the provisional agenda). In view of the short duration of the session, the Vice-Chair-cum Rapporteur will be authorized to complete the final report after closure of the session.

4. The remaining meetings, from 11 July (after the election of officers and general statements) to the morning of 13 July, can then be devoted to substantive items 3 (a) to 3 (e) of the provisional agenda (see annex). If necessary, the adoption of the report may be postponed until the late afternoon of 13 July in order to allow for an informal working session to be held that afternoon.

Item 3
Work programme, including capacity-building in and technical assistance on competition law and policy

5. The Intergovernmental Group of Experts on Competition Law and Policy will consider the UNCTAD secretariat report entitled "Review of capacity-building in and technical assistance on competition and consumer protection law and policy" (TD/B/C.I/CPLP/14) and will hear a presentation by the secretariat on the main activities implemented and on projects currently under way, as well as contributions from representatives of beneficiary countries and donor agencies. The Intergovernmental Group of Experts is expected to give guidance to the secretariat on further capacity-building work to be undertaken on competition law and policy. In accordance with paragraph 8 of the agreed conclusions adopted by the Intergovernmental Group of Experts on Competition Law and Policy at its sixteenth session (TD/B/C.I/CLP/47), the Intergovernmental Group of Experts will consider the following issues at the session: challenges faced by developing countries in competition and regulation in the maritime transport sector; and competition issues in the sale of audiovisual rights for major sporting events.

6. To facilitate a round-table discussion on the two topics, the secretariat has prepared two background documents entitled "Challenges faced by developing countries in competition and regulation in the maritime transport sector" (TD/B/C.I/CLP/49) and "Competition issues in the sale of audiovisual rights for major sporting events" (TD/B/C.I/CLP/50).

7. The Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices decided that UNCTAD should undertake further voluntary peer reviews of competition law and policy in member States or regional groupings (TD/RBP/CONF.8/11, paragraph 7). In accordance with paragraph 3 of the agreed conclusions adopted by the Intergovernmental Group of Experts at its sixteenth session, the

Intergovernmental Group of Experts will conduct a peer review of the competition law and policy of Botswana. The full report of the peer review will be made available (UNCTAD/DITC/CLP/2018/1) and, to facilitate discussion of the report, an overview will be made available in all languages (TD/B/C.I/CLP/51).

8. In accordance with paragraph 10 of the agreed conclusions adopted by the Intergovernmental Group of Experts on Competition Law and Policy at its sixteenth session, the UNCTAD secretariat will present the revised and updated commentaries on chapters V and VI of the model law on competition on the basis of submissions received from member States.

9. Experts are invited to make oral presentations supported by short written papers on the subjects referred to above. The papers will be made available in the meeting room during the consultations. Should States wish to hold consultations on other subjects, they are invited to inform the UNCTAD secretariat of the subject by no later than 15 May 2018, to enable all participants to prepare for the consultations.

Item 4
Provisional agenda for the eighteenth session of the Intergovernmental Group of Experts on Competition Law and Policy

10. Acting in its capacity as preparatory body for the eighteenth session, the Intergovernmental Group of Experts on Competition Law and Policy is expected to agree on the provisional agenda for the next session.

11. The Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices decided that future sessions of the Intergovernmental Group of Experts should include at least four clusters of issues for informal consultations among participants on competition law and policy issues, with a special focus on practical cases (TD/RBP/CONF.8/11, paragraph 19), namely:

(a) Competition and inclusive and sustainable development

(b) Best practices in the design and enforcement of competition law and policy and its interaction with consumer protection

(c) Provision of capacity-building and technical assistance

(d) International cooperation and networking.

12. The Conference also invited Governments, during future consultations at meetings of the Intergovernmental Group of Experts, to clarify the scope or application of competition laws and policies, with a view to improving mutual understanding of substantive principles and procedures of competition law and policy (TD/RBP/CONF.8/11, paragraph 21). In this context, Governments may wish to discuss the following:

(a) How competition law and policy should apply to State activities such as the regulation of State enterprises, State monopolies, natural monopolies and enterprises with exclusive rights granted by the State

(b) The contribution of competition policy in reducing all forms of poverty in the context of the post-2015 development agenda.

Item 5
Adoption of the report of the Intergovernmental Group of Experts on Competition Law and Policy

13. The Intergovernmental Group of Experts will adopt its report to the Trade and Development Commission.

Experts are requested to inform of their intention to submit papers and contributions to the UNCTAD secretariat as soon as possible and before Friday, 16 April 2018. Written papers and contributions can be submitted to the UNCTAD secretariat until Friday, 1 June 2018.

For further information, please contact Pierre Horna, Legal Affairs Officer, Competition and Consumer Policies Branch, Division on International Trade and Commodities, UNCTAD (email: pierre.horna@un.org).

Annex

Intergovernmental Group of Experts on Competition Law and Policy, seventeenth session

11–13 July 2018

Provisional meeting schedule

Palais des Nations, E-Building, room XVII

	Wednesday, 11 July 2018	*Thursday, 12 July 2018*	*Friday 13 July 2018*
10–11 a.m.		**Voluntary peer review on competition law and policy of Botswana**	**Round table** Challenges faced by developing countries in competition and regulation in the maritime transport sector
11–11.30 a.m.			
11.30 a.m.–1 p.m.		Review of UNCTAD virtual repository on good practices	
3–3.30 p.m.	**Opening plenary**	**Round table**	**Closing session**
	Keynote speech: Contribution of competition policy to the achievement of the Sustainable Development Goals	Competition issues in the sale of audiovisual rights for major sporting events	- Agreed conclusions - Provisional agenda for the eighteenth session of the Intergovernmental Group of Experts - Adoption of the report of the session
3.30–4.30 p.m.	Review of capacity-building in and technical assistance on competition and consumer protection law and policy		
4.30–6 p.m.	Report of discussion group on international cooperation		

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Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Seventeenth session
Geneva, 11–13 July 2018
Item 3 (a) (i) of the provisional agenda

Challenges faced by developing countries in competition and regulation in the maritime transport sector

Note by the UNCTAD secretariat

Executive summary

Over 80 per cent of world merchandise trade by volume and over 70 per cent by value is carried by sea and handled by seaports worldwide. More than half of the total value of global seaborne trade involves containerized cargo transported by liner shipping carriers. Maritime transport is thus highly significant for trade and development, and the liner shipping industry plays a crucial role in international trade in manufactured goods, which contributes to economic growth.

This note focuses on the regulatory framework of the liner shipping industry and related competition issues. It considers the market structure and the most recent developments with regard to competition and concentration in the sector. In addition, the note examines the challenges faced by developing countries and provides policy options for promoting competition in the industry.

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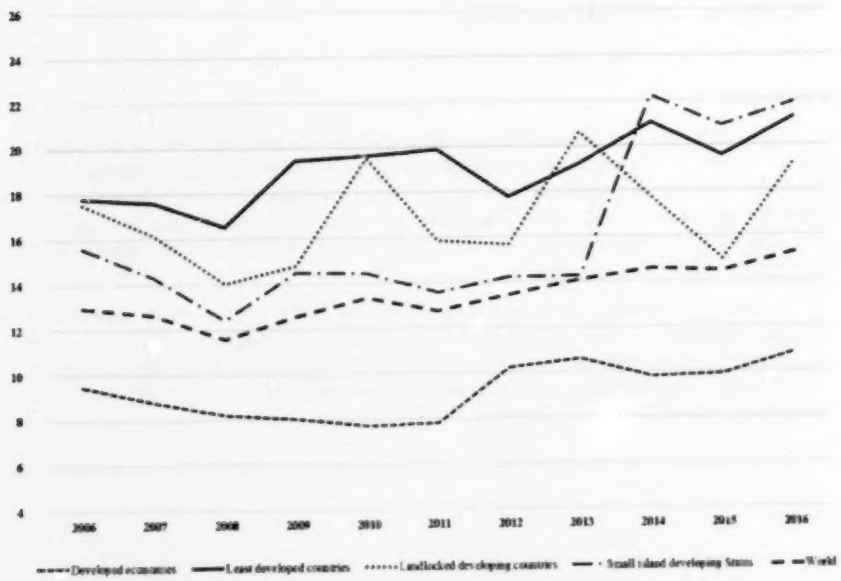
Introduction

1. The maritime transport supply chain includes many segments, ranging from the building, owning and registration of ships to the operation and scrapping of ships. Each segment involves different actors from both developed and developing countries. Over 80 per cent of world merchandise trade by volume and over 70 per cent by value is carried by sea and handled by seaports worldwide. World seaborne trade volumes are estimated to grow at a compound annual growth rate of 3.2 per cent in 2017–2022.[1] Maritime transport is thus highly significant for trade and development. In 2007, containerized cargo accounted for 52 per cent of the total value of global seaborne trade, reflecting the higher value of goods carried in containers; tanker trade accounted for 22 per cent; general cargo accounted for 20 per cent; and dry bulk accounted for 6 per cent.[2]

2. Transport costs are a non-negligible part of trade costs. In 2016, countries spent on average about 15 per cent of the value of their imports on international transport and insurance and smaller and vulnerable economies paid higher costs, reaching an average of 22 per cent in small island developing States, 19 per cent in landlocked developing countries and 21 per cent in the least developed countries (figure). Less efficient ports, inadequate infrastructure, limited economies of scale and less competitive transport markets are among the factors determining transport cost burdens in many developing countries.[3] Growing vessel sizes and reduced competition due to further consolidation may worsen this situation, in particular for small and structurally weak economies.

Transport and insurance costs of international trade, 2006–2016
(Percentage share of value of imports)



Source: UNCTAD, 2017, figure 3.5.

[1] UNCTAD, 2017, *Review of Maritime Transport 2017*, United Nations publication, sales No. E.17.II.D.10, New York and Geneva.
[2] UNCTAD, 2013, *Review of Maritime Transport 2013*, United Nations publication, sales No. E.13.II.D.9, New York and Geneva.
[3] UNCTAD, 2017.

3. The UNCTAD liner shipping connectivity index indicates the level of integration of a country into global liner shipping networks. Connectivity improved significantly in 2004–2017 and the index increased for a majority of countries.[4] An UNCTAD study assessing the impact of the nature of maritime connections on bilateral exports of containerized goods demonstrated that the quality of maritime connectivity is likely to be a significant determinant of foreign market access and, eventually, export performance.[5] This shows the importance of the liner shipping industry and the liner shipping connectivity of countries with regard to export competitiveness and global trade.

4. In 2016, the maritime transport sector continued to be affected by the economic downturn after 2009, which has brought about persistently weak global demand. The supply of carrying capacity increased faster than demand, leading to global overcapacity and depressed freight rates and shrinking the profitability of liner shipping carriers. This has led to increased consolidation through mergers and global alliances among container carriers in a market that was already highly concentrated.

5. This note focuses on the regulatory framework of the liner shipping segment of maritime transport and related competition issues. The liner shipping industry is a capital-intensive industry characterized by an imbalance between the supply of vessel capacity and the demand for moving cargo. The current context, although welcome from the perspective of shippers given the impact on rates, presents challenges to liner shipping service providers. Such challenges include compressed demand due to persistently weak growth in global trade since 2009; historically low freight rates; intense competition between carriers, potentially resulting in unsustainable cuts in rates; a race to order megaships; and new, more stringent environmental regulatory requirements.[6] To respond to such challenges, the liner shipping industry has sought to optimize capacity utilization and reduce costs through consolidation and has therefore experienced increasing market concentration in recent years. In 2016 and the first half of 2017, the industry witnessed an intensification of consolidation efforts, in the form of both mergers and acquisitions and through liner shipping alliances.

I. Liner shipping: Cooperative arrangements

6. The liner shipping industry is characterized by cooperative arrangements, which originally took the form of liner conferences and, following the initiation of containerization in 1956, have also taken the form of consortiums, strategic alliances and capacity-stabilization, vessel-sharing and voluntary-discussion agreements. The international regulatory regime was initially characterized by an almost universal exemption of all such forms of cooperation agreements from the application of competition law. Exemptions for liner conferences were justified on the basis of arguments that the specific nature of costs that characterized the sector rendered competition in the industry unsustainable, resulting in poor outcomes for all market participants. Liner conferences were therefore perceived as inevitable for the profitability and stability of carriers and for service regularity for exporters.[7]

7. The Convention on a Code of Conduct for Liner Conferences (1974) defines a liner conference as "a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates

[4] See http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=92.

[5] Quality variables include the existence of a direct maritime connection between two countries, that is, of at least one operational shipping service, and a variable resulting from an optimization algorithm indicating the number of trans-shipments necessary to connect two countries (M Fugazza, 2015, *Maritime Connectivity and Trade*, Policy Issues in International Trade and Commodities, Research Studies Series No. 70, United Nations publication, New York and Geneva).

[6] JW Butler, 2017, World Shipping Council statement to the United States Subcommittee on Coast Guard and Maritime Transportation, 3 May, Washington, D.C.

[7] Organization for Economic Cooperation and Development, 2015, Competition issues in liner shipping, DAF/COMP/WP(2015)3, 10 June.

and any other agreed conditions with respect to the provision of liner services". In modern competition law terminology, conferences fall under the definition of a price-fixing cartel.

8. Liner conferences remain exempt from competition law in many jurisdictions. In jurisdictions with exemptions, these have been softened and subjected to certain conditions, with the possibility of investigating the anti-competitive practices of conferences. The proponents of liner conferences justify their exemption on the basis of high fixed costs, large initial capital investments, other high non-cargo costs, imbalances between supply and demand and overcapacity and the need for regular, scheduled maritime shipping services in international trade.

9. The powers of liner conferences began to decrease after the 1970s. The adoption of the Ocean Shipping Reform Act in the United States of America in 1998, along with a report by the Organization for Economic Cooperation and Development in 2002, changed the international landscape for liner conferences. The main change introduced by the Act was to allow confidential service contracts with carriers outside conferences, which no longer needed to be made public. This increased competition and contributed to reducing the importance of conferences. The Organization for Economic Cooperation and Development report questioned whether antitrust exemptions for liner conferences could be justified and, upon examination of the economic rationale for such agreements, found that there was no compelling evidence of benefits for shippers and consumers. The report concluded that liner shipping conferences no longer served the purpose of guaranteeing freight rates and supply stability for shippers and, therefore, were no longer warranted.[8]

10. The report led to a review of the European Union block exemption for liner conferences and its repeal in 2008. Both the Organization for Economic Cooperation and Development report and the European Union decision to repeal block exemption led to a review of exemptions in other jurisdictions, including Australia, Israel, Japan and New Zealand, with different results. Israel repealed block exemption for shipping agreements. Other jurisdictions, such as Australia, Japan, Singapore and the United States have maintained immunity for agreements between liner shipping carriers.

11. Following the introduction of containerization, from the 1960s onwards, carriers began to focus on cost rationalization in addition to rate fixing. This brought about a proliferation of consortiums. The Organization for Economic Cooperation and Development defines consortiums as agreements and/or arrangements between liner shipping carriers "aimed primarily at supplying jointly organized services by means of various technical, operational or commercial arrangements (e.g. joint use of vessels, port installations, marketing organizations, etc.)".[9] The aims of consortiums include reducing capital costs, sharing risks, achieving economies of scale and strengthening bargaining power against terminal operators and port authorities. The latter is achieved through increased consolidation in the sector and has reached an extent where the powers of carriers compared with terminal operators may pose competition challenges and risks with regard to export competitiveness, in particular in developing countries.

12. A specific form of consortium, namely a global alliance, began to be formed in the 1990s. An alliance consists of a small group of carriers that engage in substantial asset sharing and operational cooperation while maintaining individual marketing and commercial identities. In contrast to liner conferences, alliance members do not jointly set freight rates but independently compete on pricing. Alliance members often enter into vessel-sharing agreements covering major routes, each of which may be defined as a relevant market in competition law terminology. Normally, an alliance covers at least two of the major East–West trade routes, namely Europe–Asia, Asia–United States and United States–Europe. All carriers in an alliance bring together their fleets, moving containers on behalf of each other, to extend their services and geographic coverage, with the aim of increasing market share, reducing undercapacity issues, improving co-loading opportunities, optimizing port calling efficiencies and minimizing overall risks. Many

[8] Ibid.

[9] Organization for Economic Cooperation and Development, 2002, Regulatory issues in international maritime transport, DSTI/DOT(2001)3, 8 March.

jurisdictions consider that consortiums and alliances generate efficiencies, and therefore provide general exemptions from competition law.[10] Currently, three alliances, namely the 2M Alliance, Ocean Alliance and "The" Alliance, bring together the leading 10 carriers.[11]

13. Consortiums are regulated by agreements between members, such as, in order by degree of commitment by signatories, slot-charter, slot-exchange and vessel-sharing agreements. Slot-charter agreements consist of the lease of container slots by a partner on board vessels operated by consortium members. Slot-exchange agreements are similar but also entail reciprocal chartering. Vessel-sharing agreements are the strongest agreements, and entail sharing ship capacity with partners in order to increase ship utilization rates.[12]

14. Vessel-sharing agreements are a common practice and considered to be increasingly economically relevant in the liner shipping industry. Many of the largest carriers are involved in some type of vessel-sharing agreement. Such agreements facilitate operational arrangements for the provision of liner shipping services and may include coordination or the joint operation of vessel services and the sharing of vessel capacity. They can help promote competition by facilitating market entry for carriers that do not have a sufficient volume of cargo to operate an independent vessel, in order for them to compete with other carriers on the same routes. Such agreements may benefit in particular smaller carriers or carriers that wish to enter new markets.[13] In addition, liner shipping carriers need cooperation agreements to ensure the continuity of service in the long term. The ability to easily enter into and exit agreements and adjust agreements to market changes, as well as the legal certainty provided by sector-specific regulations or exemptions, provide carriers the flexibility and ability to adjust services to changes in market conditions, with limited service disruption.[14]

15. In principle, vessel-sharing agreements do not provide for any agreement on the quantity to be carried or for price fixing. They are often exempt from competition law in many jurisdictions, and may be subject to review or approval by competition authorities. Exemptions for vessel-sharing agreements provide reassurance to liner shipping carriers by reducing or eliminating unnecessary litigation that may slow their operations.[15] One study that examined the effects of the formation and enlargement of vessel-sharing agreements on equilibrium prices, equilibrium aggregate quantities and consumer welfare showed that on a given commercially active route, the formation and enlargement of such agreements increased shipper welfare (consumer surplus) and the volume of cargo transported (equilibrium aggregate quantity) and lowered freight rates, and concluded that vessel-sharing agreements had pro-competitive effects.[16]

16. Another type of agreement is a voluntary-discussion agreement, under which parties may exchange market information, such as on supply and demand forecasts and industry trends, and subscribe to voluntary guidelines. Although non-binding, voluntary guidelines and information sharing under such agreements may facilitate price and capacity fixing and are not justified with regard to their impact on the creation of efficiencies.[17] Voluntary-discussion agreements are not exempt from competition law in the European Union. Other jurisdictions may allow such agreements along with other cooperative agreements, including price-setting liner conferences, as long as they are notified to competition authorities and are subsequently monitored. In 2013, about 65 liner conferences and voluntary-discussion agreements existed on the trans-Pacific and transatlantic routes, representing approximately 50 per cent of world trade.[18] Given its

[10] UNCTAD, 2016, Liner shipping: Is there a way for more competition? Discussion paper No. 224.

[11] For more information on global alliances, see UNCTAD, 2017.

[12] Organization for Economic Cooperation and Development, 2015.

[13] Contributions from the World Shipping Council, the European Community Shipowners' Associations and the International Chamber of Shipping.

[14] Ibid.

[15] Contribution from the Government of India.

[16] F Quartieri, 2017, Are vessel-sharing agreements pro-competitive? 21 April.

[17] Contribution from the Government of India.

[18] AJ Braakman, 2013, The anti-competitive effects of a globally concentrated, oligopolistic maritime market: From explicit to tacit collusion – An analysis based on the P3 network, *Journal of International Maritime Law*, 19(5): 419–436.

experiences in cartel investigations, the competition authority of Brazil determined that some agreements, which could initially result in economic efficiencies, had conditions that could lead to illegal agreements between competitors.[19]

II. Liner shipping: Regulatory framework for competition

17. The major liner shipping trade routes are the Asia–Europe, trans-Pacific and transatlantic routes, as well as the intra-Asia route. In 2016, world container port volumes by region were as follows: Asia, 64 per cent; Europe, 16 per cent; North America, 8 per cent; developing America, 6 per cent; Africa, 4 per cent; and Oceania, 2 per cent.[20]

18. This chapter examines the regulatory framework for competition in leading economies on major trade routes, which have a global regulatory impact, namely China, the United States and the European Union. This does not mean that regulation of the sector is limited to the relevant authorities in these jurisdictions. Other competition authorities play an essential role in ensuring competition in liner shipping, since a merger or acquisition between carriers cannot be operationalized until it has been approved by all notified jurisdictions.

19. At the international level, there is no globally endorsed, legally binding multilateral instrument on competition in liner shipping. A number of instruments related to liner shipping have been adopted under the auspices of international organizations such as UNCTAD, including the Convention on a Code of Conduct for Liner Conferences, which entered into force in 1983 and had 76 States parties as at 15 January 2018, and the guidelines for its application, developed in 1986. The Convention provides, among others, rules on access to cargo shares by shipowners established in the territories of States parties that serve their mutual foreign trade. It grants certain rights and imposes requirements upon States parties aimed at addressing the special needs of and alleviating the challenges faced by developing countries. The Convention requires 40-40-20 cargo sharing among members of liner conferences, which was an attempt to provide countries with an opportunity to participate in the carriage of their trade. However, as the Convention has not been widely implemented among States parties, this requirement has also not been implemented.

A. China

20. China is the leading global exporter with, in 2016, a 13.12 per cent share in world merchandise exports and accounting for 29 per cent of world container port throughput and 48 per cent of container port volumes handled in the top 40 container terminals.[21] China therefore plays a crucial role in the review of global alliances and mergers in the liner shipping industry.

21. The Ministry of Transport is the authority responsible for enforcing the maritime transport regulations, effective since 2002.[22] The regulations aim to, among others, regulate maritime transportation and protect fair competition and, similar to laws in the United States and the European Union, apply to liner agreements to and from ports in China.[23] According to the regulations, liner agreements and freight-rate agreements must be filed with the Shanghai Shipping Exchange, as the authority designated by the Ministry for this purpose.[24] However, in 2014, the Ministry of Commerce received the notification of the P3 alliance initiative and reviewed the case based on the powers granted under the Anti-Monopoly Law (2008) to review and approve or reject mergers and concentrations based on their competition effects (box 1).

[19] Contribution from the Government of Brazil.

[20] UNCTAD, 2017, figure 4.1.

[21] UNCTADstat database; UNCTAD 2017, tables 4.1 and 4.2.

[22] China, 2001, Regulations on international maritime transportation, Order of the State Council of China No. 335, 5 December.

[23] M Drenan, 2015, Watchdogs of the world: Global liner conference regulators in the modern shipping market and why the P3 agreement failed, *Michigan State International Law Review*, 24(1): 79–109.

[24] UNCTAD, 2016.

Box 1
P3 alliance initiative, 2013

The P3 alliance initiative involved the three largest liner shipping carriers at the time, namely Maersk, the Mediterranean Shipping Company and CMA CGM. The carriers agreed to pool vessels, equivalent to 15 per cent of global capacity, on three major routes, namely the Asia–Europe, trans-Pacific and transatlantic routes. The initiative was considered a sign of the difficulties the industry had been experiencing due to overcapacity and volatile freight rates. The agreement was notified to a number of competition authorities worldwide and was approved by European Union and United States authorities.

However, it was not operationalized due to a decision by the Ministry of Commerce of China in June 2014 to not authorize the alliance. The Ministry had evaluated the potential impact of the alliance on competition under its merger regime and decided that the alliance formed a close association, which differed from traditional vessel-sharing agreements and slot-exchange protocols with regard to forms of cooperation, operational procedure and cost sharing. The Ministry determined that the alliance would significantly enhance the market power of the parties and market concentration on the Asia–Europe route, and erect entry barriers to this route. The combined capacity share of the three carriers had reached 46.7 per cent by January 2014. The Ministry also reviewed impacts on other actors, such as competing liner shipping carriers, shippers and port authorities, and determined that the increased market power in the sector of the leading three carriers would have a negative impact on such other actors, in particular due to the strengthened bargaining power of the three carriers compared with shippers and port authorities.

Sources: *Financial Times*, 2013, Big three container shipping groups plan alliance, 18 June; Ministry of Commerce of China, 2014, Announcement No. 46, 20 June.

B. United States

22. The Federal Maritime Commission is the independent regulatory agency responsible for the regulation of seaborne transportation in the foreign commerce of the United States for the benefit of United States exporters, importers and the United States consumer.[25] Its mission is to ensure competitive and efficient maritime transportation services for shippers, by monitoring agreements among carriers and service contracts with regard to their effects on prices and services. The amendment of the Shipping Act (1916) in 1961 established the Commission and gave it the power to disapprove agreements between liner shipping carriers that were not in the public interest. In this regard, a violation of antitrust laws would be considered against the public interest. The Shipping Act (1984) removed both the public interest clause and the requirement for approval by the Commission for agreements between liner shipping carriers. Vessel-sharing agreements and other cooperative agreements are also permitted under the Act.

23. The United States has a statutory antitrust exemption for liner conferences. The Shipping Act, as amended by the Ocean Shipping Reform Act (1998), provides an alternative competition enforcement regime and includes limited antitrust immunity for agreements between liner shipping carriers from competition law. The Act introduced reforms that ended the authority of liner conferences to regulate the service contracts of members. In addition, the Act allows conference members to negotiate independent confidential service contracts with shippers and prohibits other members from retaliating against shippers or carriers that do so. Prior to the Act, such contracts had to be made public, potentially reducing the incentive for participants to enter into them. The annual report of the Commission in 2014 stated as follows: "Conference or price-fixing agreements have become largely irrelevant to United States liner shipping. No new carrier conference agreements have been filed with [the Commission] since fiscal year 2000. The

[25] Organization for Economic Cooperation and Development, 2015, Competition issues in liner shipping, DAF/COMP/WP2/WD(2015)13, 26 May.

remaining three conferences cover only government cargoes."[26] All conduct that does not fulfil antitrust exemption requirements is subject to competition law and investigated by the Department of Justice if it involves cartel-like practices, including price fixing, bid rigging and market allocation.

24. With regard to competition law enforcement related to maritime shipping services, the Commission monitors the competitive impact and commercial conditions of agreements between liner shipping carriers. Under the Act, parties must notify the Commission of such agreements and state their purpose. The Commission conducts a competition impact assessment and develops monitoring report requirements before clearing an agreement. Unless the Commission rejects it and challenges it in the courts, an agreement takes effect 45 days after filing.

C. European Union

25. Regulation No. 4056/86 provided a block exemption for liner conferences from European Union competition rules. In 2003, the European Commission initiated a review of this regulation to verify whether the justification for price fixing and supply control by liner conferences remained relevant under changing market conditions. The review found no causal link between price fixing and reliable liner shipping services. In contrast, it concluded that revocation of the exemption would improve service quality and decrease prices and lead to considerable reductions in charges and surcharges, and that the decrease in prices would provide developing countries with an opportunity to increase exports and imports. Repeal was also likely to have a positive impact on developing countries since they typically exported low-value commodities with a relatively high share of transport costs.[27]

26. Consequently, the European Union adopted Regulation No. 1419/2006, which repealed Regulation No. 4056/86 and the block exemption for liner conferences, with effect from 18 October 2008. Anti-competitive practices of liner conferences on routes to and from the European Union are no longer exempted from the scope of article 101(1) of the Treaty on the Functioning of the European Union.

27. With regard to consortiums, the European Union adopted its first block exemption in 1995, which has been reviewed several times since. Regulation No. 906/2009 extended the block exemption for consortiums until April 2020. If it is not extended following a five-year review, it will expire. The exemption is limited to international liner shipping services to or from one or more European Union ports. Consortiums do not involve price-fixing arrangements. According to Regulation No. 906/2009, consortiums improve the productivity and quality of liner shipping services through economies of scale in vessel operation and port facility utilization and promote technical and economic progress. One study attributes the favourable approach of the European Union to consortiums and/or vessel-sharing agreements to the view that they benefit not only carriers but also consumers and shippers through the trickledown effect of efficiencies.[28] According to Regulation No. 906/2009, the joint market share of the members of a consortium may not exceed 30 per cent and, if it does so, the consortium cannot benefit from the exemption. At present, consortiums and alliances exceed a 30 per cent market share and consortium or alliance members must therefore perform self-assessments of compliance with article 101(1) of the Treaty on the Functioning of the European Union. If they cannot demonstrate compliance, they must demonstrate that the consortium or alliance creates efficiencies and passes them on to customers and complies with the other conditions under article 101(3).

28. The P3 alliance initiative exceeded a 30 per cent market share and could not benefit from the block exemption. The European Commission was not required to formally approve the proposed alliance. However, it conducted a review due to the unprecedented size and characteristics of the alliance, and the potential anti-competitive effects that might

[26] Ibid.

[27] European Commission, 2005, Proposal for a Council regulation repealing Regulation No. 4056/86.

[28] Drenan, 2015.

have arisen due to exchanges of sensitive information and foreclosures in relevant markets, as well as with regard to the significance of efficiencies the alliance might have created.[29]

III. Liner shipping: Market structure, concentration and competition

29. Vessel size and capacity have increased significantly in the last decade. Maximum ship size in terms of 20-foot equivalent units grew from 8,160 in 1997 to 15,550 in 2006 and 21,100 in 2017.[30] The continuing increase is a result of the search for economies of scale, and triggers increased consolidation due to difficulties in filling megaships.

30. Liner shipping is a concentrated industry, with the five largest operators accounting for 61.1 per cent of global vessel capacity as at 30 April 2018.[31] Despite recent consolidation, container shipping remains a competitive industry.[32] One study in 1998 highlighted that mergers and acquisitions had created some large liner shipping carriers and that "the top 20 carriers now control more than half of the world's container slot capacity".[33] In 2014, the leading 10 shipping lines accounted for 68 per cent of deployed capacity; by 2018, their share had increased to 83 per cent.[34]

31. The sector witnessed greater consolidation in 2016 through mergers and acquisitions and mega-alliances (box 2). Following recent consolidations, in the first quarter of 2018, the average number of liner shipping service operators by jurisdiction fell by 7.3 per cent, compared with in the second quarter of 2016.[35] In the same period, the number of operators decreased by 19 per cent in Brazil, 17 per cent in Egypt, 13 per cent in South Africa, 8 per cent in Malaysia and 5 per cent in China.[36] The number of services provided by all liner shipping operators fell by 7.5 per cent, from 504 in the first quarter of 2014 to 466 in the first quarter of 2018.[37] The impact of increasing consolidation is also felt by smaller operators that are not a part of alliances. Their share of deployed capacity is 11 per cent on the trans-Pacific route, 7 per cent on the transatlantic route and1 per cent on the Asia–Europe route.[38]

Box 2

Recent mergers and global alliances in container shipping

The number of large-scale international carriers in the liner shipping industry had fallen from 20 to 17 by the end of 2016, as a result of the acquisition of American President Lines by CMA CGM and the merger of China Shipping Container Lines and China Ocean Shipping (Group) Company, as well as the exit of Hanjin Shipping in September 2016.

The number of carriers has further decreased with the latest mergers concluded in 2017, namely the Maersk and Hamburg Süd merger, the Hapag-Lloyd and United Arab Shipping Company merger and a new joint venture due to start operations in April 2018, Ocean Network Express, launched by the three largest lines in Japan, namely Nippon Yusen Kaisha, Mitsui Osaka Shosen Kaisha Lines and Kawasaki Kisen Kaisha Limited – K Line.

[29] Organization for Economic Cooperation and Development, 2015, Competition issues in liner shipping, DAF/COMP/WP2/WD(2015)1, 9 June.

[30] Organization for Economic Cooperation and Development International Transport Forum, 2015, *The Impact of Megaships*, Paris, p. 18.

[31] See https://alphaliner.axsmarine.com/PublicTop100/.

[32] Drewry Maritime Research, 2018, Drewry insight weekly, January.

[33] Economic Commission for Latin America and the Caribbean, 1998, *Concentration in Liner Shipping: Its Causes and Impacts for Ports and Shipping Services in Developing Regions*, Santiago.

[34] MDS Transmodal, 2018, Top 10 shipping lines control almost 90 per cent of the deep-sea market, 18 February.

[35] MDS Transmodal containership database.

[36] UNCTAD calculations based on MDS Transmodal containership database.

[37] MDS Transmodal, 2018.

[38] MDS Transmodal containership database.

There are thus at present 12 large-scale international carriers. In addition to mergers and acquisitions, shipping lines have undergone transformations through the shuffling of existing alliances and the creation of new alliances. The leading 10 carriers have joined forces in three global alliances, down from four at the start of 2016. In addition to the 2M Alliance, two new alliances, Ocean Alliance and "The" Alliance, have been established and started services in April 2017.

Source: UNCTAD, 2017.

32. Consolidation may result in better supply management and fleet utilization and improved efficiency, and benefit the industry through the pooling of cargo and through improved economies of scale, reduced operating costs and improved earnings. Carriers may also gain benefits from cooperation by sharing resources, including port calls and networks, and by developing new services. Shippers may also benefit from consolidation with regard to stability and less fluctuation in freight rates, better pricing due to economies of scale and more efficient and extensive services offered by carriers. UNCTAD estimates that consolidation will continue and that the industry will focus on reducing costs through optimized and efficient networks, better fleet utilization and the rationalization of activities.[39]

33. One study defines the container liner shipping market as a competitive one, in which supply grows faster than demand, leading to decreasing freight rates.[40] Lower rates, however, push smaller carriers out of major routes to niche markets and this may, in the long term, lead to more oligopolistic behaviour and higher freight rates. The study states that it may be sufficient to monitor the market, including with regard to variables such as freight rates and surcharges, market concentration levels and the degree of product development and differentiation.[41] However, freight rates and surcharges are only one area affected by increased market concentration. The impact of increased concentration on other components of the maritime transport supply chain should be considered, such as sailing frequencies, transit times, ports of call and associated service quality. Such factors determine the reliability and predictability of services, and are essential considerations for shippers, that is importers and exporters.

34. Growing concentration in the market increases the risk of market distortion with regard to fair competition. Risks include the fact that carriers may exert market power, limit supply and raise prices in the long term and once the industry reaches stability. In 2016, freight rates on the Shanghai, China–Santos, Brazil route increased by 261.3 per cent compared with 2015, due to the removal of half of the weekly services and more than 40 per cent of deployed capacity in November 2015–February 2016.[42]

35. With regard to the reliability and predictability of liner shipping, global schedule reliability decreased from 82.9 per cent in 2016 to 74.5 per cent in 2017. None of the leading 18 carriers improved on their 2016 reliability scores.[43] Some of the multinational retailers who employ just-in-time strategies and are the largest shippers began to switch to air cargo transportation. Air cargo is no longer a distress purchase for large retailers, but a strategic choice often planned over several months.

36. Shippers are not the only actors affected by increased concentration. Ports, including trans-shipment ports, among which competition is high and market shares are volatile, may be negatively affected if deployment strategies by alliances and the stringent requirements of megaships result in increased preferences for more direct connections. The use of megaships and consolidation through mergers and alliances also decrease the number of ports served by carriers. Megaships and greater consolidation have benefited carriers with regard to economies of scale and lower costs. However, these have implications on

[39] UNCTAD, 2017.

[40] Organization for Economic Cooperation and Development, 2015, Competition issues in liner shipping, DAF/COMP/WP2(2015)5, 10 June.

[41] Ibid.

[42] UNCTAD, 2017, table 3.1.; JOC.com, 2017, Asia–South America spot rate hits record high, 29 May.

[43] *International Transport Journal*, 2018, Liner reliability down in 2017, says Seaintel, 8 February.

other parts of the supply chain, such as shippers, ports and terminals, who need to adapt to dealing with ever-larger vessels and have become dependent on a smaller number of carriers. As a consequence of the growth in vessel size, major carriers bypass or do not call at some ports on the main trade routes. For example, in 2012–2014, the number of weekly Asia–Northern Europe loops decreased by 36 per cent.[44] Large, dominant carriers see more benefits in mergers than alliances, including with regard to costs and improved port operations.

37. In addition, there is a need for digitalization in the liner shipping industry, which requires investment and thus provides an incentive for mergers. In the light of these developments, further consolidation is expected in the industry and it is estimated that by 2028, there may be five or six actors in the sector.[45]

IV. Liner shipping: Challenges arising from competition issues

38. Continuous increases in vessel size and consolidation in the liner shipping industry have led to an oligopolistic market structure on various trade routes. Concentration is higher in smaller developing countries and small island developing States.[46] These countries may therefore face decreased liner shipping service frequencies and higher freight rates. Given the already relatively higher transport costs borne by the least developed countries, landlocked developing countries and small island developing States, their trade levels may be affected more than those of larger developing countries and developed countries.

39. The use of megaships and global alliances have further increased entry barriers in a market characterized by high fixed capital costs. This has made it almost impossible for independent carriers to compete on major trade routes, giving shippers few choices between three global alliances that do not face competitive pressure from independent carriers. This situation may negatively affect smaller importers and exporters in developing countries more than large shippers, which include large multinational retailers. The former may not have the bargaining power to negotiate better rates, terms and conditions with the leading carriers and this may adversely affect their export competitiveness, trade and, eventually, economic growth.

40. In addition, the use of megaships and consolidation in the industry raise concerns for shippers not only with regard to freight rates but also, perhaps more significantly, with regard to service quality. Shippers state that service competition has been significantly reduced and that service quality and standards have been impaired.[47] This is an increasing concern for shippers, in particular those who employ just-in-time strategies.

41. From a vertical perspective, carriers are also customers of ports and terminals. A concentrated liner shipping market may therefore pose challenges to the latter. Carriers have a high level of bargaining power compared with ports and terminals. In addition, ports face challenges in adapting to the use of megaships and the need to invest in port infrastructure. Risks associated with large infrastructure investments and the need to ensure a certain level of traffic have encouraged ports to adopt strategies that involve carriers in their ownership structures. Despite certain efficiency enhancing advantages, such vertical integration between carriers and terminal operators creates the risk of foreclosing access by competing carriers to key facilities and quality services. In such instances, competing carriers are in a disadvantageous position in using terminals owned by rival firms with regard to price, quality and the terms and conditions of terminal services offered. For example, competing carriers may be assigned days of the week that are

[44] Organization for Economic Cooperation and Development International Transport Forum, 2015.

[45] *Financial Times*, 2017, Maersk chief sees further deals in shipping container industry, 13 August.

[46] UNCTAD, forthcoming, Consolidation in liner shipping, Policy brief.

[47] Global Shippers' Forum, 2016, *The Implications of Megaships and Alliances for Competition and Total Supply Chain Efficiency: An Economic Perspective*, Tunbridge Wells, United Kingdom of Great Britain and Northern Ireland, p. 24.

disadvantageous for carriers and more costly for shippers or provided lengthier loading and uploading services at terminals.

42. Increasing the market power of global alliances may have other implications for port operators. Agreements between alliance members do not impose restrictions on the port preferences of parties, yet alliance members generally prefer the same ports.[48] Port operators that fail to come to an agreement with a global alliance may face significant market losses.

43. Some competition authorities in developing countries face challenges in cartel investigations concerning liner shipping carriers, including with regard to the difficulty of locating and notifying individuals involved in investigations, as well as the fact that the headquarters of carriers are not usually in their countries; carrier agency officials have stated that the strategic decisions of agencies are taken by branches outside of the investigating jurisdiction.[49] Competition cases that require agencies to enforce competition law on the conduct of carriers outside their territories pose a significant challenge in developing countries. Competition authorities need to advocate with other relevant government ministries and bodies for solutions suited to addressing such challenges. For example, one challenge for exporters in developing countries relates to free-on-board costs, which include the cost of moving goods from an exporter's factory to a ship and may comprise up to 100 different cost items. If importers buy at free-on-board terms, the costs are born by exporters. Since developing country exporters do not have significant power to negotiate favourable rates with large liner shipping carriers, they may end up paying high amounts, which adversely affects their competitiveness.

V. Policy options

44. There is an intrinsic link between liner shipping and global trade; one cannot exist or grow without the other. The liner shipping industry is capital intensive and often faces an imbalance between supply and demand. Given these characteristics, liner shipping carriers need cooperative arrangements such as vessel-sharing agreements, to deploy their assets and provide their services more efficiently and in a more sustainable and reliable manner. Such agreements can have pro-competitive effects and are necessary to ensure the viability of carriers along with the reliability and sustainability of services provided to shippers.

45. The industry has experienced significant changes in the last decade, including the repeal in the European Union of the block exemption for liner conferences, the introduction of megaships, increased consolidation and changes in the structure of global alliances. The market structure is therefore quite different from the era when block exemption regulations were drafted in many jurisdictions. Countries may therefore consider reviewing the need to maintain exemptions for liner conferences and voluntary-discussion agreements.

46. Given the high level of market concentration, it may be worthwhile to consider examining alliances under merger control regimes. This would provide an opportunity to fully analyse their impact on competition, service quality and efficiency and to impose appropriately designed remedies related to any concerns. Another option would be to impose reporting requirements on alliances, such as those imposed on the P3 alliance initiative by the Federal Maritime Commission of the United States. In analysing mergers and alliances, competition authorities need to look at not only price-related competition effects, but also at the variety and quality of services provided to shippers. Competition authorities need to consider the effects on the range and quality of services, frequency of ships, range of ports serviced, reliability of schedules and efficiency, among others. Such deeper analysis requires competition authorities to strengthen their merger review skills and capacities.

47. Competition authorities need to closely follow and monitor developments in the container shipping sector, in particular with regard to global alliances and other non-rate-fixing agreements exempt from competition laws, as well as freight trends and

[48] Contribution from the Government of Turkey.

[49] Contributions from the Governments of Brazil and Turkey.

market shares, to ensure fair competition and prevent anti-competitive practices in such markets. Authorities also need to take into consideration not only competition between carriers but also vertical integration between carriers and terminal operators, and the implications for competing carriers, shippers and port authorities. Concerns may be addressed by engaging with all stakeholders in the maritime transport supply chain, including carriers, shippers and port authorities. This would allow authorities and regulators to better evaluate the implications of horizontal and vertical integration in the industry and find solutions that are acceptable to all parties.

48. Ports play a crucial role in maritime transport and global trade. Competition between terminals at a port is essential to ensure the efficiency and competitiveness of terminals and ports, and any related concerns may affect the competitiveness of terminals and ports, as well as of exporters, and harm global trade. A port controlled by one or two large carriers may raise concerns for competing carriers with regard to access to services under equal terms and conditions and quality levels. Terminals or ports are usually put out for tender through concessions by port authorities and operated by the winning firms for a period of over 20 years. Competition and port authorities should therefore work together to address competition concerns that may arise, ensure fair competition at ports and enhance the competitiveness of this segment of the supply chain.

49. International cooperation is essential in dealing with cross-border anti-competitive practices, and even more so in maritime transport given its global nature, as well as its role in facilitating and promoting international trade. In this context, many member States have indicated that the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices provides the necessary mechanism for international cooperation.[50]

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[50] Contributions from the Governments of Argentina, Brazil, Kenya, Netherlands, Panama, the Republic of Korea and Turkey.

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Competition issues in the sale of audiovisual rights for major sporting events

Note by the UNCTAD secretariat

Executive summary

The economic dimension of sporting events has become increasingly important and, in recent years, the sale of audiovisual rights has revolutionized the sector. The intensification of competition in the context of a stable number of major sporting events has transformed the sale of audiovisual rights into a lucrative business capable of attracting substantial revenue. The acquisition of audiovisual rights is an enormous cost for media content providers and pay television operators and constitutes a large share of their total spending on programming. The sale and acquisition of audiovisual rights for sporting events is subject to rules on competition, notably the prohibition of anti-competitive agreements between undertakings and the abuse of dominant positions. The tendency to broadcast important sporting events through pay-television or pay-per-view models has generated a sharp increase in piracy and illegal broadcasts.

This note highlights the contribution of competition law enforcement to the provision of access by viewers to broadcast sporting events along with balanced protection for audiovisual rights. In addition, the note considers international best practices in this area, for reference by developing countries.

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Introduction: Cultural, social and economic aspects

1. Sports are a cultural and social activity practiced and valued by millions of people worldwide, in which people participate for reasons related to health, leisure, entertainment or pleasure. Sports have a unifying potential and are capable of lessening differences between people, whether these are racial, sex-related, cultural, social or economic. The cultural and social dimensions of sports transcend borders and reach all corners of the world.

2. There is a wide range of evidence of the contributions of the sport and recreation sector, in particular to improving public health, reducing crime and antisocial behaviour and fostering social cohesion. In addition, there is significant evidence of several positive social impacts from participation in sports and exercise. The highest quality evidence is of the health-related benefits, including reducing or preventing physical and mental health problems and increasing savings on health-care costs. With regard to impacts on social capital, there is evidence that sports are a type of social glue, in particular with regard to bonding.
Studies have demonstrated positive outcomes, including in reducing social and ethnic tensions and leading to greater collective action and community involvement, in particular volunteer work.

3. The economic dimension of sports is becoming increasingly important. The execution of a major sporting event assists in developing infrastructure, generating employment, securing an inflow of foreign capital and fostering players and athletes, thereby contributing significantly to national economic development. It may therefore be said that the impact of sports on society and the economy is multidimensional.[1]

4. Sport and media are closely connected. Those wishing to watch a sporting event are not always able to physically attend and therefore need a different way of participating in the live experience. Media providers can assist in this regard by ensuring access to first-hand information about the event through news reporting and/or full direct coverage through live broadcasts. In order to provide the latter, media providers need to acquire transmission rights, which are particularly valuable with regard to premium sporting events. Providers therefore tend to prefer being exclusive rightsholders of such events, to profit from advertising revenue and fees from subscribers.

I. Evolution of the sale of audiovisual rights and impact on sporting events

5. In recent decades, the sale of audiovisual rights has revolutionized the sports sector. From the 1950s to the mid-1980s, the limited number of sporting events broadcast kept retransmission prices down, and event organizers received little or no compensation from broadcasters. This situation began to change in the late 1980s and early 1990s, spurred by the progressive liberalization of broadcasting markets and by technological developments. The number of actors on the demand side rose exponentially. As a result, public broadcasters faced increasing competition from cable and satellite pay-television broadcasters and telecommunications operators. The intensification of competition in the context of a stable number of major sporting events transformed the sale of audiovisual rights into a lucrative business capable of attracting substantial revenue.

6. At present, there is a symbiotic relationship between sports and media. Sports are a source of content for the public and commercial media sector, which may even use sports as a draw to increase the number of pay-television subscribers. Similarly, the sale of television rights is a source of basic funding for sports organizations, clubs and athletes, who obtain substantial sums for both television rights and sponsorships. Premium sports content is particularly valuable for media content providers at various levels. Sports content

[1] United Nations Inter-Agency Task Force on Sport for Development and Peace, 2005, Sport as a tool for development and peace, Final report.

has a unique potential to attract large audience shares and, in general, is not substitutable by other leisure activities.

7. Due to the increased demand for premium content and the number of premium events capable of attracting substantial audiences, such content has become a scarce resource, which has contributed to a significant increase in rights-related fees. The acquisition of audiovisual rights for sporting events is a substantial cost for media content providers and pay-television operators and constitutes a large share of their total spending on programming. For example, in 2009, broadcasters in the European Union spent around €5.8 billion on the acquisition of rights, representing nearly 17 per cent of their total spending on programming of €34.5 billion.[2]

8. Among the most significant and attractive rights for media content providers are those for major international and global sporting events and the top-level championships of major sports. Other events, such as Formula One races and those of sports such as cricket, rugby and tennis, usually come in at a distant second position in total spending on audiovisual rights. In addition, there is a range of other events that vary in audience popularity by country, such as skiing in Austria, cycling in Belgium, handball in Denmark, boxing in Hungary, baseball in Japan and basketball in the United States of America.

9. Finally, the current tendency to broadcast important sporting events through pay or pay-per-view television has generated a sharp increase in piracy and illegal transmissions.

II. Economic relevance of broadcasting in sports

10. Fees for media rights for premium sporting events have increased substantially in recent decades. For example, fees for the International Federation of Association Football (FIFA) World Cup have increased by over 900 per cent in the last 20 years. The sale of audiovisual rights has become, at 40–60 per cent, one of the main pillars of the revenue stream for professional sports, along with sponsorships, ticket sales for live events and merchandising. The revenue derived from the sale of audiovisual rights for premium content is particularly central in football, as indicated in the *FIFA Financial Report 2016*. Worldwide revenue from the allocation of audiovisual rights for the FIFA World Cup increased from €84 million in 1998 to over €2.4 billion in 2014. As may be expected, amounts paid in individual national markets vary considerably. In 2016/2017, the fees for audiovisual rights for major professional leagues worldwide, in millions of euros, were as follows: National Football League (United States), 5,567; Premier League (20 teams from England and Wales, United Kingdom of Great Britain and Northern Ireland), 3,044; Major League Baseball (United States), 2,374; National Basketball Association (United States), 2,245; La Liga (Spain), 1,450; Champions League (Union of European Football Associations (UEFA)), 1,404; Bundesliga (Germany), 1,159; and Formula One, 520.

11. The Olympic Games are the most viewed sporting event in the world. The Games in 2016 were viewed by half the global population, with online consumption rising to 7.2 billion views on social media platforms, double the figure for the Games in 2012. Between the two events, television coverage increased by 13.5 per cent and digital coverage by a substantial 198.6 per cent. Audiovisual rights have been the greatest source of revenue for the Olympic Movement for over three decades. Compared with the broadcast revenue of $1.2 million from the Games in 1960, the revenue from the Games in 2016 was an estimated $4.1 billion and represented 74 per cent of the revenue sources of the Games.[3]

12. The main sporting events organized by UEFA are also illustrative of the increase in fees. In 2016, including for the European Championship, audiovisual rights revenue was €3,185 million, with €1,404 million for the Champions League and €311 million for the Europa League. In 2015, the income received by the latter two competitions was

[2] European Parliament, 2017, Audiovisual rights in sports events: [A European Union] perspective, European Parliamentary Research Service briefing.

[3] See https://www.olympic.org/broadcasters.

€1,395 million, showing an 18 per cent increase in the billing of audiovisual rights in one year.[4]

13. In 2017, the global sports market was expected to generate revenue of around $91 billion. The worldwide sporting events market is expected to increase at a compound annual growth rate of 3.6 per cent in 2017–2021.

III. Legal nature of audiovisual rights

14. Given the social role of sporting events and their macroeconomic impact on the economy, defining the limits and scope of their legal protection constitutes an important challenge for legislators. A growing part of the economic value of sports is linked to intellectual property rights. However, there are many diverging views among stakeholders and national legislators on the form and scope of the protection to be granted to sporting events. Issues concerning the relationship between sports and media have become crucial, as media coverage is one of the main sources of income for professional sports.

15. At the international level, the World Intellectual Property Organization has indirectly addressed the relationship between media and sports through treaties and conventions related to the protection of the related rights of producers and broadcasting organizations. The latter can produce recordings of sporting events and thereby benefit from the related rights protection granted to producers of audiovisual works, whereby their authorization is required for reproduction, distribution and communication to the public of the recordings.

16. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) establishes minimum standards of international protection for broadcasting organizations, and states that they have exclusive rights for 20 years to authorize or prohibit certain acts, including rebroadcasting of their broadcasts, fixation (recording) of their broadcasts, reproduction of fixations of their broadcasts and communication to the public of television broadcasts if such communication is made in venues accessible to the public in return for the payment of an entrance fee. The Convention provides a basic level of protection, yet important developments in technology and the marketplace have taken place since its adoption that are not addressed. In 1997, World Intellectual Property Organization members initiated a review of existing standards in the ambit of the Standing Committee on Copyright and Related Rights, aimed at creating an international legal framework that adequately and efficiently protects against the piracy of broadcast signals. To date, an agreement has not yet been reached on how this should be done and what further rights, if any, broadcasters should be given.

17. Member States of the European Union, in domestic legislation, do not consider that sporting events qualify for such related rights, due to the absence of any original or creative form of expression, the unpredictability and uncertainty of the execution of events and the lack of a script or plot with regard to games and competitions. The Court of Justice of the European Union confirmed this interpretation in 2011, in its judgment in *Football Association Premier League Limited and Others v. QC Leisure and Others* and *Karen Murphy v. Media Protection Services Limited*. According to the Court of Justice, sporting events, in particular football matches, which are subject to rules of the game, leave no room for creative freedom for the purposes of copyright, and as such are excluded from copyright protection. However, the reproduction, distribution or communication to the public of audiovisual work still requires the authorization of the rightsholder.

IV. Legal framework for access to major sporting events

18. The introduction of legislation related to major sporting events has been justified by claims that, in the absence of such legislation, coverage of high-profile sporting events will tend to migrate from free-to-air broadcasting to pay television. Notably, in Europe, since

[4] UEFA, 2017, *Financial Report 2015/2016*, Nyon, Switzerland.

the 1990s, live television coverage of top-level domestic football events has largely shifted from free-to-air to pay television. In the United States, the migration of coverage to pay television has been less apparent, yet in recent years, there has been a discernible shift in the availability of premium sporting event programming, from free-to-air to cable and/or satellite pay television. For example, there was some controversy when the pay-television broadcaster Entertainment and Sports Programming Network acquired the rights to the traditional Monday Night Football broadcast beginning in 2006, which had been available to viewers on a free-to-air television network for over 30 years.

19. The growth of pay television has provided significant benefits for both viewers and sports organizations yet does not diminish the argument for legislation for major events, which is based on their potential to promote and/or preserve cultural citizenship. The regulation of sports-related broadcasting at the national level reflects particular domestic historical, political and cultural traditions. Various types of regulation in this market may be distinguished for the purposes of comparative analysis.

20. First, in free market regimes, sports-related broadcasting is left to the market, under a less strict regulatory framework, to ensure free-to-air television coverage of major events. Sports-related broadcasting in Brazil, South Africa and the United States may be characterized as predominantly market driven, as there is no legislation with regard to major sporting events. In the United States, the free market approach has been a defining feature of broadcasting since its inception. There are three key points in this regard, of which the first two demonstrate the free market approach. First, the Public Broadcasting Service has been overpowered by commercial networks in bidding processes for rights to popular sporting events. Second, in the 1970s, rules introduced by the Federal Communications Commission, the national broadcasting regulator, designed to prevent cable broadcasters from acquiring the rights to broadcast specific events, such as the World Series of Major League Baseball, the Super Bowl of the National Football League and the Olympic Games, were successfully challenged in court on the grounds that they infringed on the right to freedom of speech provided for in the First Amendment to the Constitution of the United States. However, despite these two developments, commercial free-to-air broadcasters continue to play a leading role in sports-related broadcasting. Third, the Sports Broadcasting Act (1961) was designed to ensure that competition law in the United States would take into consideration the special features of sports-related broadcasting and permit the collective selling of audiovisual rights by the major national leagues.

21. Second, in strong regulation regimes such as in Australia and India, public service or commercial free-to-air broadcasters are granted a dominant role in sports-related broadcasting. For example, legislation in India provides for strong regulatory protection for the coverage of major sporting events on free-to-air television by the public service broadcaster Doordarshan. The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act (2007) prevents any pay-television broadcaster from carrying live coverage of a sporting event of national importance unless it simultaneously shares its signal with Doordarshan. In addition, major events legislation in India specifies that the sharing of television rights for listed events should take place based on a revenue-sharing agreement between the parties, with advertising revenue shared between the content rightsholder and/or owner and Doordarshan, at a ratio of not less than 75 to 25. However, the law offers little guidance on the criteria used to select sporting events of national importance, which may be most problematic with regard to coverage of the national cricket team. Cricket is the most popular sport in India and the legislation leaves it to the discretion of the Government to decide which international matches will be shown through free-to-air coverage.

22. Third, in other regulation regimes such as in the European Union, both approaches are balanced. In the European Union, legislation regarding major events was first adopted in the late 1990s as part of a renewed directive on television without frontiers, and subsequently incorporated into Directive 2010/13 of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audiovisual media services, known as the Audiovisual Media Services Directive. The legislation is based on a dual rights system, whereby audiovisual rights related to the main football leagues are exploited by operators who charge a fee for

access to content. However, there are certain events that, due to their greater general interest, must be issued on free-to-air television. In this regard, the European Commission, in 2007, in its white paper on sport, recognized the crucial role of audiovisual rights as the primary source of income for professional sports. The potential conflict between the fundamental rights of citizens, such as the right to access and receive pluralistic information, and economic principles applicable to the exclusive sale of audiovisual rights, such as the freedom to enter into a contract and property rights, was addressed by the Council of Europe in the European Convention on Transfrontier Television, as amended according to the provisions of Protocol No. 171, which entered into force in 2002. The Convention aimed to limit the conditions for the sale and acquisition of exclusive audiovisual rights. Similar concerns were raised at the level of the European Union in Directive 2010/13. The two sets of rules in this regard, in the context of both the Council of Europe and the European Union, are the legal provisions on the broadcasting of events of major importance to society and on the right to make short reports of events of high interest to the public. The former implies the coverage of certain events, as identified by member States, by free-to-air broadcasters.

23. The self-regulation of international sports organizations is also a relevant factor. Such organizations have a long tradition of self-regulation and governance. Historically, they have set their own rules and regulation in several areas, including internal functioning and inter-organizational relationships, rules of the game and financial rules. The Council of Europe was the first intergovernmental organization to recognize the right of voluntary sports organizations to establish autonomous decision-making processes, under the European Sports Charter (1992; revised in 2001).

24. The development of the broadcasting sector is characterized by increased competition among pay-television operators and the rise of new technological means, including the shifts from traditional terrestrial television to cable and satellite television and from analog to digital television, which have directly contributed to the globalization of the sports economy and the significant increase in revenue for sports organizations derived from the licencing of audiovisual rights for sporting events. The sale of audiovisual rights represents one of the most significant sources of revenue for major sports organizations such as FIFA and the International Olympic Committee.

V. Enforcement of competition law in sales of audiovisual rights

25. The sale and acquisition of audiovisual rights for sporting events is subject to rules on competition, notably the prohibition of anti-competitive agreements between undertakings and of abuse of dominance. Viewer interest varies greatly depending on territorial criteria and content, and is important in defining the relevant market. Globally, many variables make markets prone to possible anti-competitive practices. Competition law has played an important role in the enforcement of audiovisual rights, in particular with regard to sporting events in high demand, and has a fundamental impact not only on consumers, the ultimate beneficiaries of the process, but also on industries linked to this market. Athletes and tournament organizations are directly concerned with the sale of rights, yet the following are also concerned: free-to-air broadcasters; pay-television or pay-per-view broadcasters; telecommunications companies; advertisers; sponsors; and economic groups, which in recent years have invested significant amounts in some sports.

1. Definition of relevant market

26. Given the diversity of sports, the varied interest of viewers and national viewing habits, one of the main challenges in applying competition law in this area relates to the definition of the relevant market. In some instances, the definition is simple, as the tastes of consumers are evident with regard to a particular sport; in other instances, tastes are more varied, and it is necessary to perform a more exhaustive analysis of the substitutable character of a sport in comparison with other leisure activities, depending on the territory. The temporary aspect of sporting events and tournaments that have a large audience but are

held irregularly must also be considered, such as the FIFA World Cup, the Olympics and the UEFA European Championship. For example, the European Commission, in Decision 2003/778 of 23 July 2003, with regard to the joint selling of the commercial rights of the UEFA Champions League, considered that the relevant product market could be defined as the market for the acquisition of television broadcasting rights for football events held regularly throughout the year. This definition would therefore include national first and second division events, as well as championship events and Champions League and Europa League events. The broadcast of football events would create a particular brand image for a television network and allow the broadcaster to reach a particular audience that could not be reached by other programmes. The European Commission considered the geographical scope of the different markets as national or confined to linguistic regions. Audiovisual rights for football events such as those of the Champions League are normally sold on a national basis due to the national character of distribution, which is defined by national regulatory regimes, language barriers and cultural factors. Furthermore, pay-television broadcasters normally sell subscriptions only to viewers in a certain territory and advertising is typically adapted to conform to the tastes and languages of a certain territory. Similar considerations appear to apply to new media services.

27. In the United States, few judicial antitrust decisions involving professional sports have devoted significant attention to the definition of the relevant market. The Supreme Court has addressed the market definition twice, in a decision in 1959 involving the promotion and broadcasting of boxing, which upheld a lower court's determination that the relevant market was limited to championship boxing matches, and a decision in 1984 involving the broadcasting of college football games, which approved a lower court's determination that the relevant market was limited to broadcasts of college football events. Recent decisions, however, have suggested that professional sports face competition from many varied sources. The decision of the Court of Appeals in *American Needle Incorporated v. National Football League* stated that the "league competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success".[5] In a case involving licencing by Major League Baseball, the Court considered evidence that the league competed with both other sports and non-sports licensors in licencing team logos. Whether these factors will lead courts to adopt broader market definitions remains an open issue.

2. Collective selling of audiovisual rights

28. To date, the application of competition law to sports-related broadcasting has focused mainly on collective selling by sports leagues of the rights to broadcast exclusive live coverage of their events. The argument for regulatory intervention is based on the claim that collective selling through a league means that teams act as a cartel. From this perspective, collective-selling agreements restrict competition in three main ways, by:

(a) Giving a league market power to dictate the price of audiovisual rights, which leads to inflated prices both upstream, for broadcasters, and downstream, for consumers;

(b) Limiting the availability of rights for sporting events, as teams may be concerned that live broadcast coverage of events will undermine attendance revenue;

(c) Strengthening the market position of the most important broadcasters, as they may be the only operators able to bid for all the rights in a package.

29. Due to the particularities of this sector, the marketing of audiovisual rights for sporting events raises two main competition-related concerns, namely with regard to joint selling of audiovisual rights and territorial exclusivity.

30. Joint selling of audiovisual rights for sporting events has become the dominant practice since two European Commission decisions, with regard to Bundesliga, the Premier League and the UEFA Champions League, clarified the legality of this practice under strict

[5] See https://caselaw.findlaw.com/us-7th-circuit/1291215.html.

conditions.[6] Prior to these decisions, national competition authorities had prohibited joint selling on the basis of national rules on competition. In the 1990s, competition authorities in Germany, Italy, Netherlands and the United Kingdom had initiated actions with regard to the joint selling of media rights for football events and found that they were anti-competitive. The European Commission has consistently ruled that joint selling constitutes a horizontal restriction of competition and contravenes article 101(1) of the Treaty on the Functioning of the European Union. However, joint selling arrangements may be covered by the exception in article 101(3) since, as stated in Decision 2003/778 of 23 July 2003, such agreements may:

(a) Lead to improvements in production or distribution, by creating a quality branded league-focused product sold through a single point of sale;

(b) Increase efficiency, by reducing transaction costs for audiovisual operators and clubs and responding to broadcaster demands;

(c) Provide for marketing advantages, such as the branding of uniform league-focused products and services;

(d) Allow consumers to profit from the benefits deriving from an agreement.

31. The European Commission considered that the joint selling of audiovisual rights for Champions League events was unlikely to eliminate competition with regard to a substantial part of the audiovisual rights in question. The European Commission negotiated several important changes to the way UEFA sold the rights to Champions League events, including the introduction of a three-year limit on the length of any exclusive deal, the division of television rights into a number of separate packages and the unbundling of new media rights. The same principles were applied in the decisions with regard to Bundesliga and the Premier League, in which the European Commission required different modifications and commitments involving, for example, a short duration and limited scope for exclusive rights, a transparent bidding procedure, the retention of sales of certain audiovisual rights by clubs and a fall-back clause, whereby certain unsold rights might revert to the clubs for individual marketing. The approach adopted in competition law in Europe at both the national and European Union levels has been to treat audiovisual rights for exclusive live sports programming, in particular with regard to football, in accordance with the essential facilities doctrine.

32. Of these conditions, the most significant limitation to contractual freedom introduced by the European Commission may be the no-single-buyer rule, which is a commitment by national football leagues in Europe, including Ligue 1 (France),[7] Bundesliga,[8] Serie A (Italy)[9] and the Premier League,[10] to ensure that no single bidder may

[6] Commission Decision of 22 March 2006 relating to a proceeding pursuant to article 81 of the [Treaty Establishing the European Community]; Commission Decision of 19 January 2005 relating to a proceeding pursuant to article 81 of the [Treaty Establishing the European Community] and article 53(1) of the [Agreement on the European Economic Area].

[7] Relevant provisions are codified in articles L333-2 and L333-3 of the sports code and permit joint selling of sports media rights by professional leagues; rights must be offered through a public and non-discriminatory bidding procedure in different batches for a maximum duration of three years.

[8] In 2016, the German Football Association and the German Football League submitted a list of commitments to the Federal Cartel Office concerning criteria for the awarding of media rights for the games of the first and second divisions from the 2017/2018 season onward, including, in particular, a no-single-buyer rule, whereby no single bidder will be able to acquire the rights to broadcast all live Bundesliga matches; the Federal Cartel Office declared the commitments legally binding.

[9] Legislative Decree No. 9 (2008) regulates the compulsory joint selling of audiovisual rights for sporting events; article 3 states that audiovisual rights for sporting events are jointly owned by the organizer of the relevant competition and the organizer or host of each event pertaining to that competition.

[10] The Office of Communications Decision of 8 August 2016, carried out under Competition Act (1998), on whether Premier League selling arrangements restricted or distorted competition, took into account the Premier League decision to increase the number of matches available for live broadcast in the United Kingdom to a minimum of 190 per season from the start of the 2019/2020 season, an

be awarded all exclusive audiovisual rights for live broadcasts of tournaments. The main criticism of this rule concerns the penalization of end users. That is, if applied, the rule means that viewers must pay for at least two subscriptions to watch all events of a particular team.

33. The example of Spain may be considered with regard to the sale of rights. Until recently, audiovisual rights were sold individually by football clubs. The Professional Football League managed these rights until the 1997/1998 season when, following an agreement by the general assembly of the League in 1996, each club began to negotiate sales of its own rights. This changed further with the adoption by the Government of Royal Decree Law 5/2015 on urgent measures in relation to the commercialization of the rights of exploitation of audiovisual contents of professional football competitions, which regulates the commercialization of audiovisual rights of broadcast football matches, as well as the distribution of the income generated.[11] In addition, the law introduces the joint selling of audiovisual rights and entrusts the Professional Football League to manage the rights related to La Liga and the National Cup and the Royal Spanish Football Federation those of the King's Cup. This change has meant an increase of 32 per cent in annual income for La Liga.
The National Commission on Markets and Competition oversees agreements between the Professional Football League and broadcasters and, in 2015, reported on the League proposal for the joint selling of audiovisual rights for the 2016/2017 and 2018/2019 seasons.

34. With regard to territorial exclusivity, the European Commission accepts territorial restrictions on access to content, but not when territorial exclusivity is absolute. Absolute territorial protection means that licensees are prohibited from selling not only actively in the territories of other licensees but also passively, that is, by responding to unsolicited demands from customers located in other countries. The Court of Justice of the European Union, in the decisions related to the Premiere League, ruled that the system of territorially exclusive licence agreements put in place by the Football Association Premier League, which forbade licensees from supplying decoding devices that would enable access to the subject matter of rightsholders protected against use outside the territory under the licence agreement, constituted a restriction on competition prohibited under article 101 of the Treaty on the Functioning of the European Union. According to the Court of Justice, partitioning markets with the sole aim of creating artificial price differences between member States and thereby maximizing profits was irreconcilable with the Treaty. In this case, such territorial restrictions did not qualify for an exemption under article 101(3) of the Treaty, which provides an exception based on contributing to improving the production or distribution of goods or to promoting technical or economic progress. This judgment may be likely to have far-reaching ramifications for current business practices in the broadcasting sector, not only with regard to sports, but also motion pictures and other premium content offered by satellite pay-television operators. In February 2017, the European Parliament reached an informal agreement with the Council of the European Union on a draft regulation on the cross-border portability of online content. From 2018 onward, European nationals travelling to another member State of the European Union will be able to retain subscriptions for online content, such as sports, music, games and films; portability will not be restricted in time and will apply to all subscription service content and to free services that wish to participate.

35. In the United States, some activities related to the broadcasting of professional sports are exempt from antitrust laws. The Sports Broadcasting Act (1961) exempted from antitrust laws the pooling of sponsored audiovisual rights for sale as a package by the professional baseball, basketball, football and hockey leagues. The Act overturned the decision of a district court that had declared that a contract between the National Football League and a major television network was prohibited under the terms of an injunction entered as a result of an earlier antitrust suit. Thus, even if collective television contracts are subject to scrutiny under the Act, they may still be permitted, as a league is viewed as a

increase of at least 22 matches per season over the number sold for live broadcast in the Premier League auction in 2015.

[11] See http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4780.

single economic entity in marketing its games or because collective action by the teams is deemed either ancillary to the legitimate aims of the joint venture or otherwise reasonable. The most prominent Supreme Court decision, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, involved broadcasts of college football games and related to the limits that the Association placed on televised broadcasts of such games. This case is widely cited even in areas beyond college-level sports.

36. In New Zealand, there are no statutory provisions permitting professional leagues or federations to sell television rights to games of their respective member teams as a package without violating competition law. To date, however, there has been no challenge in the courts to the practice of pooling sports-related audiovisual rights.

37. In India, competition law has had little impact on sports-related broadcasting. However, given the importance of cricket for pay-television broadcasters, the Competition Commission of India, in an order dated 29 November 2017 under case No. 61/2010, addressed the granting of franchise, media and sponsorship rights by the Board of Control for Cricket in India in the context of the Premier League and found that the Board had abused its dominant position.

38. Competition issues in the sale of audiovisual rights for major sporting events are relevant both for developed and developing countries, due to the shared interest of viewers in broadcast events and the transition to digital broadcasting systems in most developing countries. Technological convergence has promoted competition, and competition authorities in several developing countries have therefore faced market access issues and anti-competitive practices in recent years. [12] Regulatory challenges faced by more experienced competition authorities and the decisions undertaken may serve as important references for small and young authorities addressing the restrictive practices of international actors.

VI. Future challenges

39. Professional sports are a product of substantial consumption worldwide. The recognition of the positive effects that major sporting events can have on society emphasizes the importance of their being broadcast, as it is unlikely that everyone interested in an event will be able to physically attend. This implies that free-to-air live coverage of the most relevant events remains an important gateway for the effective achievement of objectives related to the right of citizens to information.

40. There are at least two challenges that affect the sale of rights in sports-related broadcasting, namely digital disruption and the increase in piracy and illegal streaming.

41. Digital disruption in sports-related broadcasting occurs worldwide. The emergence of new technologies has had a profound effect on how viewers consume sports-related broadcasts, as consumption moves to mobile-first, as is also occurring in the music and motion picture industries. This change involves the following three broad underlying factors:

(a) A shift in the viewing behaviours and consumption habits of modern sports fans;

(b) The everchanging media rights landscape and the proliferation of digital media;

(c) The emergence of new technology, which can be leveraged to create unprecedented levels of engagement, including increased levels of broadband speed, the exponential growth of free Wi-Fi, including at the premises of sporting events, and the increasing sophistication of smartphone cameras.

[12] See the compilation of documents of the Global Forum on Competition of the Organization for Economic Cooperation and Development, available at http://www.oecd.org/competition/competition-television-broadcasting.htm.

42. In recent years, there has been a reduction in broadcasting of the most in-demand sports on free-to-air television, in favour of pay television, and this has generated a substantial increase in piracy and illegal streaming.

43. In the 2012–2013 season, there were approximately 33,000 unauthorized live streams of Premier League games and about 17,500 such streams for Bundesliga games; the latter is a substantial 647.8 per cent increase compared with the figures for the 2009–2010 season. The quality of such streams is improving rapidly, due in part to the widespread availability of low-cost technology that facilitates the illegal retransmission of broadcasts. Illegal streaming has also moved beyond individual users to commercial premises.[13]

44. The scale of the challenge faced by sporting event broadcasters in combating piracy is shown by the fact that more than half of millennials watch illegal streams of live events. According to one survey, 54 per cent of millennials have watched illegal streams of live sporting events and a third admit to regularly watching them, compared with 4 per cent of those over 35, and those aged 18–24 are also half as likely, at 12–24 per cent, to have subscriptions to pay television services.[14] The unauthorized streaming of live sports transmissions over the Internet has become one of the main concerns in sports media, as broadcasters have lost billions of dollars' worth of sports-related broadcasting contracts and sponsorship deals.

45. The scale of this problem has caused serious harm to both sports rightsholders and broadcasters. Given the substantial economic investment required to obtain exclusive licences for sporting events, the infringement of intellectual property rights causes considerable harm to rightsholders. In the long term, it also puts at risk the value of those rights and, therefore, the revenues of sports organizations. A report of the National Observatory for Telecommunications and the Information Society indicates that, in Spain, in 2015, the cost of loss of income due to piracy was €1,669 million, given illegal access to 4,307 million items of digital content with a market value of €24,085 million, of which €186 million represented serial programmes, €573 million represented movies and €174 million represented football.[15] A progressive increase in piracy and illegal streaming over the Internet could reduce the billing of television operators, organizations and sports teams and clubs. In certain sports, revenue from television rights represents more than 50 per cent of the billing of clubs; taking this into consideration, it is clear that the impact of such practices can affect the continuance of professional sport in its present form.

VII. Conclusions and questions for discussion

46. The sale of audiovisual rights in sports is a topic of great importance for the maintenance of professional elite sport worldwide. At present, more than 50 per cent of the funding of sports organizations and teams at this level is financed by the sale of audiovisual rights. Similarly, television operators obtain higher profits from advertisers or subscribers if broadcasts of major sports programmes are included in their programming. The symbiosis between broadcasting and professional sports has led to a considerable increase in the price of audiovisual rights and generated higher profits for organizations and teams, which in turn has raised the level of the salaries and contracts of elite athletes, with the consequent risk of needing to address such payments if the sector enters a financial crisis.

47. Competition authorities play an important role in the sale of audiovisual rights. They need to monitor both the criteria applied to the sale of such rights and the duration of contracts, to allow for a rotation in access to content by broadcasters in the market.

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[13] European Parliament, 2017.

[14] *The Guardian*, 2017, More than half of young people watch illegal streams of live sports, study finds, 26 April.

[15] National Observatory for Telecommunications and the Information Society, 2016, Observatory of piracy and habits of consumption of digital content, available at http://lacoalicion.es/wp-content/uploads/ejecutivo-observatorio-2015-vd-es.pdf (accessed 2 May 2018).

48. Guaranteeing viewer access to the content of sports events through televised broadcasts, in particular for major events of general interest, and facilitating equity in the participation of broadcasters in the process of selling audiovisual rights are aspects of concern for public authorities, in particular competition authorities, which have had to intervene to establish guidelines in the sale of such rights.

49. New technology has led to an increase in piracy and the illegal retransmission of programmes over the Internet, and this is an important challenge, given that piracy and illegal streaming are decreasing the turnover of television operators. Responses to such challenges depend on youth who have already adopted new viewing habits for major sporting events using the latest generation of digital media and who are also exposed to challenges related to the development of new technology. If the trend of piracy and illegal streaming continues, the risk of a financial crisis in the sports-related broadcasting industry may be exacerbated.

50. The Intergovernmental Group of Experts on Competition Law and Policy may wish to consider the following questions for discussion:

(a) Rising fees for audiovisual rights paid by television broadcasters have increased the profits of sports clubs and the salaries of athletes, yet is this sustainable over time, and what measures may be undertaken to ensure sustainability?

(b) Pay television needs to propose major sporting events to appeal to subscribers; in order to ensure equal access to such content, are current competition rules sufficient or is a specific regulation necessary on this matter?

(c) There is a growing trend to grant audiovisual rights to pay-television and pay-per-view broadcasters; as access to content by viewers is thus made more onerous, in particular in developing countries, is it advisable to expand open-access viewing of major sporting events and what criteria should be applied to the sale of rights in developing countries to ensure competition between broadcasters, and what role might competition authorities play in this regard?

(d) There has been an increase in piracy and illegal streaming, and young viewers are increasingly unwilling to pay to watch major sporting events instead of viewing them for free; could this put the financing of elite sport at risk and what strategies may be implemented by authorities, sports organizations and broadcasters to reduce illegal streaming?

(e) Given the interest in broadcast sporting events in developing countries, are there any specific challenges and recommendations that should be discussed?

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Voluntary peer review on competition law and policy: Botswana

Overview*

* The findings, interpretations and conclusions expressed herein are those of the author and do not necessarily reflect the views of the United Nations or its officials or Member States. The present document has not been formally edited.

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Preface

This overview is a part of the full report entitled *Voluntary Peer Review of Competition Law and Policy: Botswana*.[1] The purpose of the exercise is to evaluate the competition law framework and enforcement experience of Botswana, identify the lessons to be learned and make recommendations that aim at improving the system in line with international best practice.

This overview examines the current state of competition law and policy in Botswana on the basis of an extensive review of relevant documents and a fact-finding mission to Gaborone to gather information on the experience of the Competition Authority and the representative of relevant stakeholders, including government ministries, sector regulators, private sector and academia among others. The review of documents included the Economic Mapping Report (2002), Legislative Inventory Report (2002), Competition Policy (2005), Competition Act (2009), Competition Bill (2017), different sector regulatory Laws, State of the Nation Address by the President of Botswana, Lieutenant General Doctor, Seretse Khama Ian Khama in October 2017, Botswana Vision 2036 document and the Eleventh National Development Plan.

A fact-finding mission to Botswana took place from 6 to 11 November 2017. During the mission, interviews were conducted with various institutions, government ministries, sector regulators, private sector representatives, case complainants and respondents, academia and other entities with interest in competition matters.

[1] UNCTAD, 2018 (forthcoming). The full report of the voluntary peer review of Botswana contains more detailed information pertaining to the enforcement of competition law, including an account of the interviews that UNCTAD conducted during its fact-finding mission to Gaborone.

I. Foundations and history of competition policy in Botswana

A. Introduction

1. The present report is based on information gathered during a fact-finding mission to Botswana conducted in October 2017 and information available from various sources, including government ministry websites. Legislative developments since information was first gathered have been considered in finalizing the report.

B. Historical, social, political and economic context

1. History and social context

2. Botswana, formerly known as Bechuanaland, is a landlocked country in Southern Africa that shares borders with Zambia to the north, Zimbabwe to the north-east, Namibia to the west and South Africa to the south and south-east. Its main seaport access is through South Africa. Botswana covers 582,000 km^2, which is a large area with a relatively small population estimated at 2,230,905 persons in 2016. Though sparsely populated, the Government of Botswana has committed resources to protect and preserve some of the largest areas of Africa's wilderness.

2. Political context

3. Botswana stands out for its political stability and good governance. The country represents Africa's longest running multi-party democracy, has a good human rights record and has been stable since independence. Botswana is a multiparty republic, with elections held every five years. The country's parliament consists of two houses: the National Assembly and the House of Chiefs. Appointed by parliament, the president is Head of State and Government, serving a maximum of two five-year terms in office.[2] As of 1 April 2018, the President is Mokgweetsi Eric Keabetswe Masisi.

3. Economic context

4. Botswana has recorded remarkable growth from the time of the country's independence from the United Kingdom of Great Britain and Northern Ireland in 1966. It has emerged as one of the fastest growing economies in the world, averaging 5 per cent per year in the last decade. The performance stemming from sound management of mineral revenues, mainly from diamonds, and good governance has led Botswana to reach the level of an upper middle-income country.

5. Vision 2036 is a road map employed by the Government of Botswana to meet its twenty-first century objectives. At its core, based on its four pillars, the Vision recognizes that the outstanding economic, social, environmental and governance issues of Botswana are interconnected. Botswana has a comparatively low inflation rate, averaging 3.5 per cent annually from 2014 to 2017, which is expected to remain within the lower end medium-term objective range of 3 to 6 per cent of the Bank of Botswana.

6. In line with the long-term Vision of Botswana, the Government has embarked on a cluster development initiative to enhance economic diversification in five priority sectors, namely beef, diamond beneficiation, financial services, mining and tourism. An action plan for capacity-building is being put in place for each of the clusters.

[2] All references pertaining to the text in this overview report are found in UNCTAD, 2018, *Voluntary Peer Review of Competition Law and Policy: Botswana*, forthcoming (United Nations publication, New York and Geneva).

C. Evolution of the competition law and policy of Botswana

7. Botswana has had an open economy since independence in 1966 and has consistently sought to strengthen the functioning of markets.

8. Beginning in 1999, Botswana started the process of looking at business conditions and thinking of how regulatory measures can be put forward to ensure a level playing field for business to operate. Two reports (an economic mapping report and legislative inventory reports) were finalized in 2002 to look at the market structure, conducts and laws, with a view to averting provisions in such laws that can be considered anti-competitive and harmful to consumer welfare. The endeavour was a consultative process spearheaded by UNCTAD and funded by the United Nations Development Programme through its country programme on private sector development.

9. The reports were used in drafting the Competition Policy, adopted in 2005, and a Competition Act, which was enacted in 2009 and became law in 2010. The Act provided for the establishment of a Competition Commission and a Competition Authority, launched in 2011 to deal with competition cases in merger control, abuse of dominance and other anti-competitive practices.

10. In recent developments, Competition Bill No. 22 of December 2017 was passed. A Competition Authority with a new name, the Competition and Consumer Authority, was established. At the time of preparation of the present report, the Competition Bill was awaiting presidential assent.

D. Competition policy framework

11. The National Competition Policy for Botswana was adopted in 2005 and aimed at harnessing the Government's desire to maximize the benefits of trade and investment liberalization, deregulation, privatization and safeguard the gains likely to be eroded by anticompetitive practices in a deregulated environment. The Policy also aims at addressing problems related to the globalization of cartels, abuse of market dominance and monopolization of key sectors, following the opening up of markets and the associated and incidental increase in cross-border trade matters, as well as investment flows.

E. Legal framework for competition law

12. The law in force is Competition Act No. 17 of 2010; the Competition Regulations of 2011 and the Rules of the Competition Commission (the Tribunal), 2012, should also be mentioned. In December 2017, the Parliament of Botswana passed the Competition Bill. Presidential assent is currently awaited, followed by promulgation by the Minister. This report will focus on the provisions of the Competition Bill, with selected references to the Competition Act.

II. Institutional framework for implementation of competition policy and law

A. The Competition Authority of Botswana

13. Section 4 of the Competition Act establishes the Competition Authority as a body corporate, capable of suing and being sued, subject to the provisions of the Competition Act.

Functions of the Competition Authority of Botswana

14. The Competition Policy mentions only the establishment of the Competition Authority and proceeds to proclaim that, as part of its responsibility in implementing the Policy and its related legislation, the Authority will have power to enforce the Competition Act, including conducting investigations, prosecuting transgressions of the Competition Act and presiding over disputes, whereas parties aggrieved by a decision of the Competition Authority will have the right to appeal to the High Court.

B. The Competition Commission of Botswana

15. Section 9 of the Competition Act establishes the Competition Commission, which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority. The Commission shall adjudicate on matters brought before it by the Authority under the Act and give general policy direction to the Authority.

16. Considering the functions of the Competition and Consumer Authority (CCA), the appointment of members as well as power to initiate complaints and enforce compliance with the Competition Bill; the CCA may investigate impediments to competition in its capacity as a regulator.

C. Institutional set-up in Botswana under Competition Bill No. 22 of 2017

17. Section 6 of the Competition Bill establishes a body to be known as the Competition and Consumer Board, which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority as well as general policy direction to the Authority.

18. The wording in the Competition Act portrays the Authority and the Commission as distinct bodies, whereas there are many other factors and indicators that Commission is the constitution of the Authority, implying they are one and the same. Much as the Competition Bill sought to remedy this shortcoming, the language in the text as provided above still poses the same risk of interpretation that the Authority and the CCA are distinct bodies.

D. Procedure for handling of notified mergers versus other restricted practices

1. Procedure for handling of notified mergers

19. The procedure for handling of notified mergers is provided under section 51(2) 51(3). An aggrieved party is given the opportunity to appeal to the Tribunal as per section 57 of the Competition Bill.

2. Procedure for handling other restricted practices

20. Pursuant to Section 36 of the Competition Bill, the CCA may, either on its own initiative or upon receipt of information or a complaint from any person, before commencing any investigation, conduct a preliminary inquiry into any practice where the CCA has reasonable grounds to suspect that the practice in question may constitute an infringement.

21. The procedure is such that the CCA may appoint an inspector to produce a report with respect to infringement of the above, pursuant to section 39 of the Competition Bill, and, within 12 months of completing the investigations, refer the matter to the Tribunal, if the CCA determines that a prohibited practice has been established, or issue a notice of non-referral.

E. The Tribunal

22. Section 62 of the Competition Bill provides for the establishment of the Tribunal, invariably, section 63 of the Competition Bill provides for jurisdiction of the Tribunal. The Tribunal has been established with two types of adjudicative powers, namely, the first instance and appellant.

1. First instance jurisdiction

23. The Tribunal shall adjudicate over any matter brought before the Tribunal by the Authority or by a complainant regarding a breach of any of the provisions of this Act.

2. Appellate jurisdiction

24. The Tribunal shall adjudicate over any appeal brought in accordance with the provisions of this Act.

25. The construing of section 73 is to the effect that all that is investigated under section 39 should be referred to the Tribunal within 12 months of completion of investigation for adjudication whereby the CCA shall prosecute the same at the Tribunal consistent with Section 5 (2) (o) and (p) of the Competition Bill.

26. Section 67(3) of the Competition Act, 2009 provides to the effect that an appeal against the Court's (High Court) judgment may be made to the Court of Appeal, but only on a point of law arising from the judgment of the Court, or from any decision of the Court as to the amount of a penalty. The Competition Bill has departed from this position, whereby sections 83 and 84 of the same make reference to appeals and judicial review to the High Court and stops thereafter.

27. It was revealed that the Authority has lost all cases at the Competition Commission, High Court and Court of Appeal on procedural technicalities and that there has not been any case decided on merits of competition by neither the High Court nor the Court of Appeal during the six years of competition law enforcement in Botswana.

28. Findings have revealed that competition expertise is not well developed in the High Court of Botswana for reasons that competition culture and its enforcement practice remains generally both low and new in Botswana.

29. Given the advantages for a specialized competition appellant body and, as the Tribunal has been established with both first instance and appellant jurisdiction, there should be room for manoeuvring, to attempt to fix the mechanism that would see all competition matters first dealt with by the CCA, then appealed at the Tribunal before they go on for further appeal at the High Court.

30. The Competition Bill provides for both rules and regulation-making powers in relation to operations of the CCA in sections 94 and 95. Based on the foregoing, as a general rule, CCA lacks the power to act beyond the scope of its enabling legislation (Doctrine of Ultra vires). The Competition Bill is unlikely to bring about any issues that relate to natural justice breach in so far as separation of powers; as such CCA is mindful of natural justice principle as described above.

F. Sanctions

31. Enforcement of compliance is usually criminal in nature. The Competition Bill provides that "any officer or director of an enterprise who contravenes Section 25 commits an offence and is liable to a fine not exceeding 100,000 pula or to a term of imprisonment not exceeding five years, or to both".

32. The Competition Bill does not categorically provide for the procedure to be followed when a person is to be committed to prison.

33. The Competition Bill in Section 76 (1), (2) and (3) sanctions, albeit discretionary, financial penalties to horizontal (section 25) and vertical agreements (section 25) to enterprises. The provisions provide that the Tribunal may, in addition to, or instead of, giving a direction, make an order imposing a financial penalty (not to exceed ten per cent of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years).

34. The Competition Bill in section 58 (3) (b) sanctions unnotified mergers a fine not exceeding ten per cent of the consideration or the combined turnover of the parties involved in the merger, whichever is greater. The 0 to 10 per cent of the turnover range could be considered too wide and can pose challenges if specific guidance is not available to determine a commensurate level of financial penalty.

35. The Competition Bill does not directly sanction unnotified agreement prohibited by Rule of Reason under section 28 read together with section 33 of the Competition Bill and Abuse of Dominant Position under 31 of the Competition Bill. Upon conclusion that such infractions have been occasioned by an enterprise, section 77 of the Competition Bill provides that the Tribunal shall give the enterprise(s) concerned such directions as the Tribunal considers necessary, reasonable or practicable including some structural remedies mentioned in subsection 3 (c) of section 77.

36. There is a possibility for a mismatch of gravity of offences and penalties for offences that bear similar magnitude of effects in the economy and markets caused by enterprises equally convicted but equivocally convicted by the same Tribunal.

37. The ideal situation would be to de-link only the personal part of criminology as done under the Competition Bill and link all offences as against enterprise under sections 25, 27, 28, 31 and 59(2) of the Competition Bill so as to ensure offences with similar gravity are accorded commensurate and similar penalties.

III. Competition law enforcement

A. Mergers

38. Section 45(1) of the Competition Bill defines a merger. Section 45(2) of the Bill provides the manner that Acquisition may be achieved.

39. The term "merger" as defined in the Competition Bill does not include joint ventures resulting in the establishment of green field enterprises and the general provision under Section 45 (2) (b) cannot justify the omission of a specific provision to cover for such mergers. The underlying principle was that such joint ventures and strategic alliances have the same effect as pure mergers and should therefore be examined for possible anti-competitive effects.

40. Section 45 (3) of the Competition Bill has covered for the decisive influence test by referring to the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in companies act, in particular majority of shareholding to with 50 per cent or majority of voting rights in a company. This means, irrespective of the quantum of shareholding or voting rights that are at play in a merger transaction, should it result in a decisive influence change, the transaction amounts to a merger.

41. Section 46 of the Competition Bill is an "import" from section 53 of the Competition Act, it provides for exemption from mergers control by the minister. The provision empowers the minister to make regulations aimed at exempting enterprises from review of mergers based on the commercial or industrial sector involved, the nature of the activities in which the enterprise is engaged or some aspect of the general public interest. Furthermore, the minister may prescribe alternative system of merger review as the minister considers appropriate.

42. To date, the provision has not been put to operation, but it potentially bears inherent risk of misuse and or inconsistence to the spirit of the provision of section 3 of the Competition Bill, which presses for its application to the economic activities within, or having effect within, Botswana as the general rule.

43. Ordinarily, exemptions from application of the competition legislation is directed to sector specific regulations which has been provided for under section 86 of the Competition Bill and would cover all aspects of competition and not only mergers.

44. Section 49 of the Competition Bill provides for a pre-merger notification regime, which requires mergers with values at or above a prescribed threshold (currently $1,200,000 of the combined annual turnover or assets in Botswana of the merging parties).

45. Pursuant to section 63 of the Competition Act, which is currently in use as good law in Botswana, unnotified mergers were not sanctioned by any penalty other than directives to make good of the infraction. Invariably, pursuant to section 58 (3) of the Competition Bill, failure to notify a notifiable merger is an infraction that upon conviction attracts a penalty of a fine not exceeding ten per cent of the consideration or the combined turnover of the parties involved in the merger, whichever is greater. This is a good development in line with international best practice.

46. Under the Competition Bill, unnotified mergers are procedurally dealt with pursuant to section 58(2) read together with section 59(1).

47. The procedure for handling of unnotified merger is contentious and litigious just as is the process for revocation of an approved merger and rejection of a notified. Ordinarily, because of the resemblance, one would be inclined to expect the means involved in handling the likes to also be alike. Nevertheless, procedure for revocation of an approved merger and rejection of a notified merger is different from handling of unnotified mergers.

48. Revocation of an approved merger and rejection of a notified merger are dealt with at the CCA at first instance whereas unnotified mergers are de jure prosecuted at the Tribunal at first instance. This shortcoming should also be looked at for possible rectification for the betterment of competition enforcement on mergers and acquisitions aspect in Botswana.

B. Restrictive trade practices

1. Per se prohibited agreements

49. The horizontal per se agreements are dealt with under section 25 of the competition Bill, which covers conducts related to price fixing, division of markets and bid rigging alone. Despite the mention of the conducts, the Competition Bill has not provided for what would constitute elements for each prohibited conduct. Given the criminal nature and sanctions of infractions under section 25 as provided by section 26 of the Competition Bill, it would be prudent for the provision to expressly provide for elements that the CCA would have to establish for the criminal infraction.

50. Section 25 of the Competition Bill has not provided for commonly found horizontal agreement on output restriction between competitors and collective boycott by competitors, which many jurisdictions prohibit irrespective of their effects (per se).

51. The Competition Bill has not provided a clearly articulated procedure for giving effect to the criminalization of infractions provided under section 26. The only provision is that under section 5(2) (r) the CCA is required to report the investigation of all criminal matters under the Competition Bill to the Botswana Police Service. The Bill is not clear as to the role of police since the CCA is also an investigatory body mandated to investigate matters prohibited under the Competition Bill. The reporting the CCA does to the police, which may not necessarily be well vested with competition criminology, may set a serious hurdle to enforcement of the provision.

52. Ordinarily, since the CCA shall have finished its investigation, perhaps incidence into the criminal justice machinery could have been at the Director of Public Prosecution seeking the consent to prosecute the criminality with reference to seeking a custodial sentence before the appropriate Court of Law. It is also observed that the Competition Act has not specified which Court shall be used to enforce section 26.

53. It is also observed that matters related to section 25 are decided by the Tribunal at first instance following referral by the CCA of the Tribunal pursuant to section 73 of the Competition Bill. It not clear as to how the two processes of referring the investigated matter if referring the matter to the Tribunal and reporting the matter to the Botswana Police Service are going to be handled without clashing.

2. Agreements prohibited by rule of reason

54. Section 28 of the Competition Bill provide for horizontal agreements prohibited by rule of reason. Notification for rule of reason agreements is provided for under Section 28 (1) and (2) of the Competition Bill. Despite the fact that the exemptions for agreement assessment criteria is provided for under section 33 of the Competition Bill, the process for notification by the parties to the agreement has not been provided for under the Competition Bill. The provision should have expressly provided that parties to the agreement should apply to the Authority for the exemption.

55. The specific timeframe for which the agreement will be reviewed is not stipulated leaving the default time for investigation provided under section 73 (1) of the Competition Bill to wit the CCA shall refer the matter to the Tribunal within one year after it has competed its investigation. The provision as it is serves the unnotified agreements well just like the unnotified mergers are subjected to investigation procedure under section 39 of the Competition Bill. For those notified agreements, specific reasonable timeframes should have been assigned for the review process as provided for notified mergers, section 49 of the Bill.

56. With regards to the prohibitions under section 28(1) (b) (c) and (d) to wit agreement which (b) restrains production or sale, including restraint by quota; (c) involves a concerted practice; or (d) involves a collective denial of access of an enterprise in an arrangement or association crucial to competition. The provisions in (b) and (d) portray a mix up of prohibitions as they seem to refer to output restriction and collective boycott by competitors which are issues dealt with under per se prohibited agreements. On the other hand, (c) refers to concerted practice which has not been defined generally refers to an agreement in competition arena as opposed to unilateral practice leaving its existence wanting in the legislation.

57. With regards to the prohibitions mentioned in section 28 (2) (a) (b) (c), the provision under 28 (2) (a) can be construed to refer to output restriction, an issue dealt with under per se approach. Section 28 (2) (b) and 28 (2) (c) can be construed to refer to price discrimination and tying and bundling which are issues dealt with under abuse of dominance as prohibited exploitative conducts.

58. Based on the above, it is apparent that the concept of rule of reason has been lost as a result of mixing up of issues as explained. The cited shortcomings should also be looked at for possible rectification for the betterment of competition enforcement of agreements under rule of reason prohibitions.

C. Abuse of dominant position

59. Abuse of dominance prohibition provisions are usually drafted to target conducts by a dominant enterprise either unilaterally or in combination with other enterprises "combined dominance". Normally, the targeted conduct is one that "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market".

60. The Competition Bill does contain an express and general prohibition of abuse of dominance under section 31(1). The Bill also provides public interest considerations in the

course of establishing a dominant position under section 31(2). Dominant position is defined under section 32.

61. The provision provides for both situations of dominance, unilateral conduct and combined dominance in line with best practice of modern competition laws. However, a close look at the two provisions read together, it is observed that section 32 (a) and (b) provides for the threshold (market share) for which the enterprise(s) shall be determined as dominant in the defined relevant market without expressly mentioning a definite figure thus if construed loosely, it has a potential of protracted arguments on the same.

62. Invariably, it is observed that section 32 (a) and (b) lacks the condition precedent "potent element" of prohibiting only those conducts by dominant enterprise which "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market".

63. Specifically provided numerical thresholds and a condition precedent are helpful to establish and thus easier to be complied with as compared to other more flexible approaches which require in-depth understanding of competition which is vividly lacking in the developing world, including Botswana.

64. Section 31(2) permits for consideration of public interest issues listed in items (a) to (e) on discretionary basis in the course of investigation of abuse of dominance cases. Should the CCA opt not to take into account the public interest issues in its assessment, this subsection becomes inapplicable and harmless.

65. The issue arises when the CCA invokes section 31 (2) of the Competition Bill; the question is whether the CCA can decline to prohibit an abuse of dominance conduct under section 31 (1) (a) to (e) to the extent that it relates to a market in Botswana pursuant to section 3 1 (1) of the Competition Bill. The Competition Bill is silent on the effects of operation of section 31(2) on CCA's prohibition of an abuse of dominance conduct pursuant to section 31 (1) of the Competition Bill.

66. Section 31(2) refers to agreement of enterprise while assessing the application of public interest issues in determining abuse of dominance. This is taxonomically incorrect since agreements being them vertical or horizontal constitute a different category of prohibited practice dealt with under sections 25, 27 and 28 and are distinct from abuse of dominance issues. Invariably, it was earlier pointed out that there are issues of abuse of dominance that have been provided for under agreements prohibited by rule of reason provided under section 28 of the Competition Bill. Both these anomalies have to be looked at for possible rectification so as to avoid confusion to users of the law.

67. The list of abusive conducts under section 31(1) (a) to (e) has been drafted exhaustively thus legally, leaving no room for inclusion of those conducts not mentioned by the list. Ordinarily, such list would have been left open-ended (non- exhaustive) to accommodate all other theories of harm under the abuse of dominance prohibitions that may in due course arise in the course of development of competition law or those inadvertently left out, such as, loyalty discounts and rebates.

68. With regards to the specifics, during the period under review, there were 73 cases related to abuse of dominance practices of which 54 cases equivalent to 74 per cent were closed due to lack of competition issues, 9 cases (equivalent to 12.3 per cent) were closed for unstated reasons. This makes a total of 63 cases equivalent of 86.3 per cent of all abuse of dominance cases that were initiated during the period closed for either having no competition issues or other reasons. No case has been referred the Competition Commission and 9 cases (equivalent to 12.3 per cent) were still ongoing before the Competition Commission at the time of the peer review fact finding mission.

69. During the period under review, there were 38 cases related to horizontal and vertical agreements initiated. Twenty-one of these, equivalent to 55.3 per cent were closed due to lack of competition issues, whereas 9 cases equivalent to 23.6 per cent were closed due to other unstated reasons. This makes a total of 30 cases equivalent of 79 per cent of all horizontal and vertical agreements cases that were initiated during the period closed for either having no competition issues or other reasons. Four cases equivalent to 10.5 per cent

were referred to the Competition Commission and 4 cases equivalent to 10.5 per cent were still ongoing before the Competition Commission at the time of the peer review.

70. With regard to resale price maintenance, six cases were initiated, of which one case was closed due to lack of competition issues, four were referred to the Competition Commission and one is ongoing before the Competition Commission.

71. Moving forward, given the architecture of the Competition Bill with regard to the nature of prohibitions associated to the anticompetitive restrictive practices issues discussed earlier, and without prejudice to the sovereignty of Competition Authority and Competition Commission's decisions, it is logical to conclude that there is need for a new dawn ushered by the Competition Bill to properly provide for restrictive practices, identify offences associated to such practices and prohibit the same.

IV. Non-enforcement competition issues

Market studies

72. Market studies are conducted pursuant to section 5 (2) (g) of the Competition Bill, with a view to provide leads to the enforcement leg of the Authority as well as feeding into the advocacy wing of the Competition Authority with informed positions policies, programmes and other interventions that distort markets whilst being unenforceable.

73. The Authority has conducted five market studies recently, in aviation, shopping malls and retail sector (in-house brands). There is no evidence that findings of the studies have provided input to either enforcement or advocacy functions of the Authority.

74. The link between the studies and cases should be developed and grown for the good of competition practice in Botswana. Invariably, the small number of studies is proof of the need to recruit additional staff for investigations and legal departments.

V. Competition advocacy

75. The Authority carries out advocacy under section 5(2) (d) and (e) of the Competition Act which is in *pari materia* with the provision of section 5(2) (d) and (e) of the Competition Bill.

A. The Cabinet Minister

76. In Botswana, the Competition Authority and the CCA as the case shall be under the Competition Bill shall also be under the Ministry of Investment Trade and Industry.

77. The Minister has also been given powers to determine technical competition matters that should otherwise be left for the Members of the Commission and the Competition Act or the Board under the Competition Bill such as those discussed under mergers provisions, which allow the Minister to determine the fate of a merger, should be avoided. The Minister should be left with the general oversight and administrative parts of functioning of the CCA and the members that the Minister appoints based on their expertise and competencies to deal with technical matters.

B. Academia

78. The Department of Economics of the University of Botswana is working on a curriculum for the postgraduate diploma in the Economics of Competition Policy and Regulation, which may take at least one year to complete.

79. In future, the University of Botswana, Economics Department would wish to collaborate with the Competition Authority of Botswana in the area of market studies/research including outsourcing.

80. The Legal Department runs summer course on law of sales and credit agreement on consumer protection.

81. The Law Department recommended a memorandum of understanding (MOU) between the Competition Authority and the University of Botswana to cooperate on competition and consumer protection issues. The lecturers and students with an interest in competition and consumer issues could be invited to future competition advocacy and training events organized by the Competition Authority.

C. Business community

82. The interview of legal practitioners showed that there was very little interaction public education institutions; as such there have not been any established relationship. With regard to competition law practice, it was reported that there was no firm that specializes in competition, but business law practitioners were seen to be possible candidates for such specialization due to resemblance of the issues. It was further found out that, most legal firms had not placed competition as a priority on their agenda, partly because there was no direct demand for such services from the market and also because the Authority had not been active in using the Botswana Bar as a forum for promoting competition law practice.

83. Most of the interviewed key stakeholders reported that the Authority is mostly well known in the area of merger control, adding that a lot of work has been done.

84. It was revealed that there was no established relationship between the Business Botswana and the Authority neither is there found evidence that the Authority has taken advantage of the available platforms under the Business Botswana to advance its course.

85. It was also observed that the link between research and advocacy functions remain low or non-existent as there is no evidence of research work that has been used as input to advocacy work of the Authority for the past six years.

VI. Other laws of importance to competition law enforcement

A. Sector regulators

86. The CCA is deemed to have no jurisdiction over all the regulated sectors (network-based utilities), which would entail electricity, petroleum, water, gas collectively known as energy; communication; surface and marine transport, and civil aviation sectors. This is first, consistent with the National Competition Policy and also within international best practice on selection of sectors to be condemned to economic regulation. Invariably, since both the National Competition Policy and the Competition Bill under its section 86 (5) have provided for consultative mechanism for the CCA and the sector specific regulators; the understanding is clear that there should be concurrent jurisdiction between
the CCA and the sector specific regulators.

87. The Competition Authority has signed memorandums of understanding with regulators in the telecommunications and the civil aviation sectors. Without prejudice to the content of the referred MoUs, best practice is for the Competition Statute and those of the Sectoral Regulators who practice economic regulation to categorically provide for a mechanism of ensuring that the competition issues in the sectors under their respective economic regulation ambits are attended to. This can be done either by formulation of separate legal instruments or by instruments that refer such issues to the CCA. Reading of the enabling provisions of the two economic regulators visited together with the relevant provision of the Competition Act as well as the Competition Bill, do not provide for such a desired architecture.

88. Section 20 of the Telecommunications Act provides on monitoring of competition in telecommunications sector and the civil aviation legislation is silent on such matters.

The energy regulator has just been formed whereas the surface and marine transport regulator(s) have not been established.

89. Placement of competition and regulatory authorities under one central ministry, so as to avoid competing and conflicting policy objectives as well as the disjoint between competition and regulation in Botswana could be a solution to the observed mishaps.

B. Intellectual property

90. Intellectual property in Botswana is administered by the Companies and Intellectual Property Authority (CIPA) which is responsible for administrating four pieces of legislation. CIPA doubles as a business registrar as well as a patent registrar and administrator. As such, CIPA is more of a Registrar of Companies than a regulator.

91. Within the legal and policy framework for competition, intellectual property rights have been catered for in both the National Competition Policy and the Competition Bill. However, both the policy and the law in Botswana have exempted intellectual property.

92. Despite the exemption discussed above, CIPA and the Authority have a three-year-old MOU, which among other things has achieved coordination between the two and CIPA, has included in its checklist for amalgamations (mergers and acquisitions), a requirement for a letter of approval from the Authority to be filed by the merging parties.

93. At a later stage of development of the two legislations, CIPA and CCA should consider having cross-referencing of the enabling legislation so as to provide for evaluation of registered intellectual property rights.

C. Consumer protection

94. In Botswana, consumer protection issues have been dealt with pursuant to the provisions of the Consumer Protection Act No.42-07 of 1998. The Consumer Protection Office in the Ministry of Investment, Trade and Industry (MITI) has all along been implementing the Act. In December 2017 Parliament passed the Consumer Protection Bill No. 23 of 2017 into law and now awaiting to become law after presidential assent. Effective from the assent, the new Competition and Consumer Authority will be implementing both competition and consumer protection laws in Botswana.

95. Despite the fact that there have been no consumer protection issues dealt with so far, review of the Consumer Protection Bill passed can produce a few things that the CCA can watch for effective take off.

VII. Organizational structure of the Competition Authority of Botswana

A. The Commission/the Competition and Consumer Board

96. Section 6 of the Competition Bill establishes the Competition and Consumer Board which shall replace the Commission which is its equivalent under the Competition Act. Section 7 of the Competition Bill provides for the Minister to appoint seven members and select from among them a Chair, as per subsection 4. The provision does not provide for any procedure to be followed by the Minister in exercising of these powers. Section 8 provides for tenure of the members as not exceeding five years with a possibility of one further term of same tenure. A maximum of 10 years can be considered long enough for members to make a meaningful contribution to the CCA.

97. Nevertheless, the Minister can within the law as written appoint members for less than the stipulated five years and if misapplied can lead to problems faced by other jurisdiction of shortness of tenure of members and even absence of the Board or Commission such as the case for the United Republic of Tanzania in 2015/16. This ensures

there is continuity of the business of the CCA at all times especially when applied prudently to ensure longevity of tenure of all members occasioned by staggered appointments of 5 years to all members in compliance with the provision.

B. The secretariat

98. This consists of the Chief Executive Officer (CEO) and the rest of the staff. Accordingly, there is a very strong link between the Investigations Department and the Legal and Enforcement Department, as well as the Mergers and Monopolies Department.

99. The Ministry responsible for the Commission approves the organization structure under the Competition Bill, However, adjustment would need to be done in order for the proposed structure to accommodate the inclusion of Consumer Protection issues under the mandate of CCA. This is an avoidable constraint that the CCA should be allowed to vary the organization structure without involving the Ministry so as to hasten processes for operational efficiency purposes.

100. With regard to the competition functions, it is important to design an organization structure that will allow for end-to-end completion of the tasks performed by one department. This is to say the directorate that handles whichever of the restrictive trade practice should be able to handle the whole case to finality of the same.

VIII. Resources of the Competition Authority of Botswana

101. The Authority has a human resources base of 34 staff, out of which 16 are technical, whereas 18 from the Office of the CEO and Corporate Services are mostly support staff. Most of the current employees were relatively experienced and familiar with the functions they perform at the Authority, having worked for the Authority for at least four years. Only a few were new to the Authority.

102. Since its inception in 2011, a lot of time and resources have been spent on training and retraining Authority staff in investigations, prosecution and economic analysis, as well as relevant specialised professional areas in support services. There are no severe complaints on the part of staff in relation to remuneration on the part of the staff of the Authority; a problem that exists in most of competition authorities within the region. It was also observed that the level of staff turnover is relatively low

103. The Authority does not have a sufficient number of staff specifically dealing with ICT, despite existence of justifiable demand for an additional full-time employee, preferably a manager to manage ICT affairs of the Authority.

104. Regarding financial resources, the Authority has insufficient funds to carry out the broad mandate it has been statutorily given. The only reliable source is the Government subvention, which should ideally be the only source of funds for the CCA. It was revealed that the Treasury has the discretion to take the merger fees from Authority although so far that has not happened.

105. There is evidence from the practice of coexistence of competition and economic regulation that economic regulatory authorities have often had excess money that emanate from their regulatory functions. Other jurisdictions (Turkey and the United Republic of Tanzania) have statutorily provided in their competition laws that they shall receive funds from the regulated sectors authorities based on the principle that the two serve the same consumer hence need for sharing to avoid multiple levies by the authorities that be.

IX. Judiciary

106. Section 67(3) of the Competition Act, 2009 provides to the effect that an appeal against the Court's (High Court) judgment may be made to the Court of Appeal, but only on a point of law arising from the judgment of the Court, or from any decision of the Court as to the amount of a penalty. The Competition Bill has departed from this position,

whereby sections 83 and 84 of the same make reference to appeals and judicial review to the High Court and stops thereafter. Consultation with the Attorney General Chambers confirmed that the Court of Appeal provision was removed because it was redundant. All High Court matters are appealable to the Court of Appeal.

107. This confirmation by the Attorney General Chambers should be looked at and be adopted by the Judiciary with a view to ensure that competition cases are not excluded from the benefit of the scrutiny of the Court of Appeal thus offering either a secondary or tertiary chance of appeal to the aggrieved parties in the course of dispensing competition justice in Botswana.

X. General considerations and policy recommendations

108. There is need for the political system to assure all investors, domestic and foreign, of their protection and access to fair, equitable, transparent and accountable investment opportunities, processes and incentives thereto.

109. Now that under the Competition Bill the CCA and the Tribunal are poised to be separate legal entities, experience elsewhere is that the duo coexists in a high-paced and time-limited working environment, whereby personal working relationships may not be prioritized.

110. It is important that the CCA and the Tribunal engage in more team-building activities to influence a greater team spirit.

A. Recommendations addressed to the Government

111. There should be sufficient allocation of financial and human resources to cover the observed gaps so as to ensure sufficiency at the Authority.

112. The Authority should be enabled to exercise independence to vary working tools such as the organizational structure without the need for Ministry to endorse the same to allow more flexibility and increased efficiency of delivery.

113. Consideration should be given to placing sector economic regulation authorities and the Competition Authority under the same central Ministry wherever possible to promote their coexistence, independency and efficiencies.

B. Recommendations addressed to the Competition Authority of Botswana

114. The institutional set-up and practice for the enforcement of competition should be revisited with a view to creating a practical and dynamic set-up that assures the necessary parties of their basic procedural rights.

115. There should be placement of required skills and competences in departments so as to meet the delivery expectation on an end-to-end basis that reduces interdepartmental dependency, in particular legal minds in all enforcement related departments.

116. Capacity-building and training of staff should be accorded priority, including staff needs assessment to guide the training programmes to be developed.

117. With the new mandate on Consumer Protection, there is need to produce a road map report on the merging of the two functions and assign competencies in the two areas.

118. Commensurate capacity-building and training on consumer protection, including needs assessment to guide the training programmes needs to be developed.

119. Work with local universities to develop a curriculum on competition and consumer protection should be undertaken.

120. Consider establishing an annual conference on competition law with the Law Society in Botswana and its related stakeholders would also be necessary, along the lines of the American Bar Association's annual antitrust meetings held in the second quarter.

121. Tailor-made advocacy programmes, which address specific target groups in the economy, including the business community, consumer organizations, government ministries and departments, the judiciary and business lawyers, should be developed.

C. Recommendations addressed to the judiciary

122. There is need for more interaction between the CCA and the judiciary.

123. The judiciary should consider attending certain forums on competition law enforcement to interact with other judges handling competition issues and thus enhance and sustain such knowledge and skills.